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PREFACE.

THE following work was undertaken, from a consideration that it might be useful to the commercial part of the community, to have the law and authorities relative to bills of exchange collected and stated in a form to which all might have access. For above a century past, the trade and manufactures of this country have been advancing with rapid strides; and bills have come to be so generally employed in all mercantile dealings, that they may be said to have in a great degree superseded the use of cash. It is highly necessary, therefore, that every person should in some measure be acquainted with the laws established with regard to these documents.

From the number of questions that have occurred, and which have been ultimately determined by the Supreme Court of the kingdom, a great mass of decisions has been reported; and as the law might be considered as ascertained in so many cases, the subject, as a branch of the commercial jurisprudence of the country, being obviously susceptible of the form, seemed

seemed to be entitled to the rank, of a separate treatise. As this might be accomplished by a proper selection and arrangement of the materials, the author conceived that he could not better employ his leisure hours, than in endeavouring to collect the authorities from the different volumes of decisions, and to reduce them, along with the information derived from other sources, into something of a systematic shape.

It is perhaps somewhat singular, that although, in England, there is a great variety of treatises on bills, no recent attempt of the kind has been made in this country, where bills are peculiarly interwoven with many parts of the municipal law, so as to hold a very interesting and conspicuous station. The only work on the subject is that of Mr Forbes, Professor of Law in the University of Glasgow, which was written and published about a hundred years ago; a performance unquestionably of merit in its day, and displaying considerable erudition, but which is now rather obsolete, both in matter and style.

In treating the subject under different distinct heads, in the natural order of the constitution, transference, and extinction, of the bill, it was scarcely possible to avoid some repetitions; but the charge of redundancy was rather chosen to be incurred, than that of being unexplicit or obscure. Many disputes having

having arisen from an ignorance of, or inattention to, the necessary requisites of bills, the author has been particularly full on that part of the subject. To professional men, the details into which he has entered may appear unimportant or unnecessary; but it is to be remembered, that the work is in a great measure calculated for classes of the community who have not the same opportunities of acquiring information that they have; and, by the candid, this will be admitted as a sufficient excuse. But even to professional men it may be of service, inasmuch as it may tend to point out cases, and direct their attention to authorities, which they may wish to consult.

It is therefore hoped that the work will be found to be of some utility; but, whatever may be its reception, the author will at least have the satisfaction of reflecting, that his researches have been accompanied often with amusement, and generally with some improvement to himself.

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ted that, before the bill became payable, a letter had been ſent to the indorſer, informing him that it fell due on a certain day, and deſiring him to attend to it; but this, he contended, was not tantamount to a regular notification of diſhonour, becauſe the bill might have been retired by the accepter. Macdougal *a.* Davidſon.

2. A perſon drew a bill for 140l. upon his debtor, payable to himſelf or order, three months after date, which he ſubſcribed as drawer, This bill he ſent to the debtor for acceptance. About fifteen months afterwards, he brought an action againſt the debtor for payment of his account, amounting to 147l., which the debtor ſaid he had no objection to pay, upon being allowed deduction for 140l., the amount of a retired bill in his poſſeſſion, which he produced with his name ſcored. The creditor urged, that he had indeed ſent ſuch a bill for acceptance, but that it had never been returned to him accepted; and that this was one reaſon of his demanding payment of the full ſum due to him. The debtor, on the other hand, alleged that he had paid the bill, which had been drawn for a part of the debt; that as a retired document in his hands, it was probative of its amount; and that the preſumption of payment thence ariſing, could only be redargued by a contrary proof. To this it was rejoined, that the circumſtance, of the bill being in the accepter's hands, did not, under the other circumſtances of the caſe, amount to a preſumption of its having been paid, eſpecially as there was no indorſement by the drawer, or receipt of payment on the bill, or elſewhere; and that it was incumbent on the accepter to prove that the bill had been in the poſſeſſion of the drawer after acceptance. The question therefore is, Whether or not an accepted bill, in the cuſtody of the accepter after it is due, but without any receipt or indorſation upon it, affords a ſufficient preſumption of its having been paid by him?—which question the Court has not yet determined. Cuthill *a.* Oſwald.

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No. II. *Table of Stamp Duties exigible on Bills and Notes.*

No. III. *Forms of Protests, and of the Acceptance* supra *Protest.*

ERRATA.

p. 32. Note, for *coresponding*, read *corresponding*.

p. 51. Note, for § 56, read § 36.

p. 79. End of Note[1] read, " 1800, *Allan* a. *Young*, *Fac. Coll. No.* 170. *p.* 388. " omitted.

p. 109. Note[6] for Gordon *a. James*, read Gordon *a. Innes*.

p. 134. Line 15. from top, for *this*, read *his*.

p. 140. Note[7] for *neglected*, read *negotiated*.

INTRODUCTION.

BILLS OF EXCHANGE are universally acknowledged to be the most useful instruments of commerce; nor is it easy, in the present day, to conceive how an extensive trade could be carried on without them. In a commercial country, it might appear an object of rational curiosity, to trace the history of any of those causes, to the operation of which, trade in general may have been indebted for its prosperity and advancement. But the origin of bills of exchange is involved in considerable obscurity; and it is not very well ascertained whether the invention is attributable to the ancient or modern world.

In the rudest stages of society, it is natural to suppose that the limited traffic of mankind was carried on by barter, or a direct exchange of commodities. But the inconvenience and inadequacy of this, must soon have taught them the necessity of adopting some common standard of value. It is probable, that those

commodities which were of most current disposal, or in greatest request, were at first used as a measure of the exchangeable value of others. In early times cattle seem to have been a common instrument of commerce; and in Homer, the price of armour is estimated by the number of oxen which it cost. In preference, however, to every other commodity, men appear in all countries to have soon given a decided preference to metals as a medium of exchange. Iron performed the function of money at Lacedemon, and copper among the first Romans; but, in richer countries, the precious metals superseded all others. We find that gold and silver were used, at a very remote period, as a representative of value, not merely in bullion, but as current money. Abraham weighed to Ephron four hundred shekels of silver, current money with the merchant, for the field of Machpelah[1]. The shekels are here said to have been received by weight; but it is pretty evident they were a coined money: for, among the same people, it is afterwards represented that, to facilitate the offerings to the tabernacle, they were furnished with half shekels and smaller coins, to purchase sheep, doves, &c. for the sacrifices[2]. And at any rate, the transition is obvious from the use of the precious metals in bullion as a medium of exchange, to the erection of mints, and the institution

[1] Gen. ch. 23. v. 16.

[2] Exodus, ch. 30. and 38.

tion of coins, by which the weight and fineness of the metal is ascertained [3].

But, as the carriage and transportation of specie from one country to another, must have been liable to many accidents, and attended with considerable danger, the adoption of bills of exchange, would apparently be a necessary consequence of extensive commercial dealings [4]; as, by their aid, the value of money may be transmitted without risk, from the most distant quarters of the globe. It might be thought, therefore, that, like many other excellent mercantile expedients, which necessity and experience seem gradually to have suggested, the use of bills must soon have occurred to any people in the habits of frequent and established intercourse with other countries, the communication between which and their own was in any degree exposed to difficulty or peril.

Almost all the French [5] and English writers on the subject,

[3] Wealth of Nations, v. 1. p. 38.

[4] Molloy de Jure Maritimo et Navali, v. 2. b. 2. c. 10.

[5] Savary concludes his Inquiry 'de l'Origine du Contrat de Change de place en place par Lettres,' in this categorical manner, 'Ce chapitre ne fournit qu'une maxime.'

MAXIME.

'Le contrat de change n'a pas eté connu par l'anciens.' L'Art des Lettres de Change, ch. 2.

Monteſquieu expreſsly aſcribes the invention to the Jews in the middle ages. 'Ils (les Juifs) *inventerent* les lettres

subject, however, agree in this, that bills of exchange are of modern origin. Few traces of bills are indeed to be met with in antiquity; but Boucher, in his Commercial Institutions[6], is of opinion, that the ancients must have been acquainted with the exchange contract, whether the proper bill of exchange, as the instrument by which it is accomplished, was known to them or not. 'In the history of the commerce and navigation of the Egyptians,' says he, 'we find, that when the young Hyrcanius travelled to Alexandria, to congratulate, in behalf of the Syrian nobility, king Ptolemy Epiphanes, on the birth of a son, his father Joseph gave him a letter on his correspondent, a Jewish merchant there, who advanced him considerable sums, as well for his own expenditure, as for the presents made by him to the king and queen of Egypt. It is to be presumed,' he adds, 'that on this transaction the Jewish merchant would have a premium of exchange, and a commission corresponding

de change; et par ce moyen le commerce put eluder la violence, et fe maintenir partout: le negociant le plus riche n'ayant que des biens inviſibles qui pouvoient etre envoyés partout, et ne laiſſoient de trace nulle part.' De L'Eſprit des Loix, Liv. 21. ch. 20.

Pothier obſerves, 'Qu'il n'y a aucun veſtige de notre contrat de change, ni des lettres de change dans le Droit Romain.'—Traités de Droit Civil, tit. du Contrat de Change, n. 6.—Dupuis de la Serra, &c.

[6] Inſtitutions Commerciales. Paris, 1801.

ing to the expense and risk of transmitting the money into such a country as Egypt, which was then infested with robbers[7].'

Cicero too, informs Atticus, [8] that 'being desirous of sending his son to Athens, he meant to spare him the trouble and necessity of carrying the cash for which he might have occasion, by arranging with some one at Rome who would charge himself with ordering payment of the money, by one or other of his debtors at Athens.' Pothier remarks, that this was more of a simple mandate, than of a bill of exchange; but the learned professor has himself defined a bill of exchange to be a mandate; and the mandate by which Cicero transmitted the value of money from Rome to Athens, must have been something analogous to the exchange contract, as the difference in the value of money in the two places, if not the rate of exchange, must have entered into the transaction. There is, no doubt, this essential difference, that the contract of mandate is gratuitous in its nature, and the mandate cannot be transferred by the mandatary; whereas, the mandate by which the contract of exchange is executed, is both transferable in the way of negotiation, and is not always gratuitous.

But it has been evinced in a pretty satisfac-

[7] Chap. 21. p. 193.

[8] Epist. ad Att. xii. 24—xv. 25.

tory manner, by an ingenious writer, in his philosophical dissertations on the Greeks, that even the proper bill of exchange, as a mode of transferring property, and making remittances in payment of commodities, was known to the Athenians in their mercantile operations. In treating of the commerce and finances of Athens, and describing the trade carried on by that city with the ports of the Taurica Chersonesus, which we now name the Crimea, the following passage occurs, which, as it is curious, deserves to be transcribed.

'In short, Theudosia (one of the ports) was, in the time of Demosthenes, the grand entrepôt of the commerce of the Athenians in the Crimea; and they exported from it, in the course of a few years, an almost incredible quantity of grain. As the Black Sea is extremely stormy, and the straits of the Propontis strewed with rocks and shoals, many cargoes were lost in so long and perilous a voyage. Besides, in time of war, it was necessary to have armed squadrons to convoy the vessels which transported the harvests of the Peninsula to Attica; and this was attended with a double expense, that exhausted the riches of individuals and the public treasure.

'It is in the operations of this commerce, that we find the first notion of Bills of Exchange; and Isocrates says in the clearest manner, that a stranger who had brought cargoes of grain to Athens, gave

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to a merchant there, named Stratocles, a bill of exchange drawn upon some place in the Euxine Sea where there was money owing him. He to whom the bill was delivered found it of the greatest benefit; for he had no occasion to expose his fortune upon a sea swarming with pirates and Lacedemonian privateers, which lay in wait to capture every vessel that came out of the ports of Attica.

'It may therefore be said, that it was at first the dangers of the sea, and afterwards the dread of corsairs, or declared enemies, which inspired merchants with the idea of such an operation. As the credit of the Greeks, however, was in little repute, this Stratocles, of whom we were speaking, took very good precautions: for he required, as security, a banker of Athens, upon whom he might have recourse, in case his bill was protested in the Crimea, inasmuch as he who had drawn it was at that time without any fixed residence.' [9]

But

[9] De Pauw, Recherches Philoſophiques ſur les Grecs, tom. 1. p. 2. § 5., and Demoſthenes, Iſocrates and Strabo, there quoted. Even at preſent, the trade carried on with the Ruſſian ports in the Black Sea, labours under a conſiderable diſadvantage, from the want of a fixed exchange. Moſt of the ſhips going to Odeſſa and Taganrock, are obliged to carry ſpecie, viz. Venetian ſequins, Dutch ducats, or Spaniſh dollars, which are purchaſed, at no ſmall expenſe, at Conſtantinople or Smyrna. This mo-

But it must be acknowledged, that if the ancients were at all acquainted with bills of exchange, it must have been in a very limited degree; for scarce a vestige of them remains in history; and if these instruments were known, it is somewhat unaccountable that they were not introduced into more general use than they seem to have been. No authentic record is extant of their having been employed by the Rhodians, Phenicians, Carthaginians, and other commercial states. Nor is any notice taken of them in the famous Rhodian laws with regard to navigation and maritime affairs, which were adopted by the Romans; and as they are not mentioned in the Civil law, Pothier very justly infers that they were not known to that people.

In modern times, bills of exchange appear to have been first used, to any extent, about the end of the twelfth, and beginning of the thirteenth century, by the

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ney, even after the risk of sea-carriage, must, on arriving at the above ports, be packed up and forwarded to Moscow, to be exchanged for Russian paper money, the only money, except copper coin, which is current among the holders of produce. The loss and inconvenience attending this mode of trafficking, independent of the risk of transmitting specie by a dangerous and ill known sea, is sufficiently evident. At times there has been a loss of 30 per cent., and never less than from 15 to 20 per cent.; which might be avoided, by an established correspondence and credit, and the power of drawing bills of exchange.

the Jews, who being obliged to make a precipitate retreat from France and England, on account of the exorbitant exactions of the sovereigns of those kingdoms, took refuge in Italy, where they contrived to withdraw their property from the countries from which they had fled. This they accomplished, by giving letters to foreign merchants and travellers, addressed to the persons under whose charge they had left their effects, who, by complying with the orders contained in these letters, discharged the trust reposed in them. A similar method is said to have been employed by the Ghibellins, when, driven from Italy by the victorious faction of the Guelphs, they retired to France and Holland. From these countries, for certain sums advanced, they gave letters of the same description on their private friends, ordering them to pay these sums to the holders of the letters, the amount of the sums in the respective places being regulated by the value of the coin exchanged. In the course of time, these letters came to be called bills, or letters of exchange; and as many of them came back unpaid, this gave rise to the charge of re-exchange. A knowledge of the importance and utility of bills of exchange was widely diffused over Europe by the commercial operations of the Dutch; and they at length came to be employed in the mercantile transactions of all countries. The laws of exchange were established by the common consent of

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all trading nations, under the denomination of the custom of merchants; and the privileges of bills were ascertained by a reference to these laws, which, in a short progress of time, came to be incorporated by each state with its own municipal institutions.

EXCHANGE, as a term of commerce, is a contract of money. In this sense, says Dupuis, there are properly two modes of exchange, which are lawful all over the world,—that of money against money, and that by bills. In real exchange, as it is called, there are usually four persons concerned; two at the place where the bill is drawn, and two at the place of payment. 1. The person who delivers the money, who is called the remitter. 2. The person who takes up the money by exchange, and draws the bill. 3. The person drawn upon, who is to pay the money. And, 4. The person to whom the money is to be paid. Thus, John of Oporto has a certain sum for wine owing him by Henry of Glasgow; and James of Oporto is indebted, in an equal sum, to Edward of Glasgow, for muslins. Henry pays the money to Edward, who draws a bill on James, payable to Henry, or order. This bill Henry indorses, and remits to John, who presents it to James for acceptance, and recovers payment

ment from him when it becomes due. The price of the muslins is thus paid at Glasgow, and the price of the wine at Oporto. There is consequently a double accommodation to both debtors, proportioned to the risk and expense of transmitting money from Oporto to Glasgow, and from Glasgow to Oporto: And the creditors are also benefited as the payments to them are thus facilitated, and an advantage given in their future transactions with the same persons. In this manner, by the intervention of bills of exchange, the whole goods in any two countries may be bought and sold without the necessity of any carriage, or transmission of specie. The commodities which one merchant exports, are paid by those which another imports; and if the whole value of exports and imports be unequal, the balance is settled by bills on a different country.

There is another mode of drawing bills, where only three parties are interested. John at Hamburgh wishes to remit a certain sum, which he owes to Henry of Glasgow; and having in that city Edward, a debtor of his, he draws a bill on Edward for the amount, payable to Henry or his order, to whom he remits the bill in lieu of the money. This is now the most usual and prevalent method of drawing bills, which arises from the extended intercourse between nations in their commercial transactions. But bills may be employed in various other ways.

For

For instance, John in Dublin takes up money from James in that place, and gives him a bill for the amount on Henry of Glasgow, which James transmits to his correspondent in that city, who negotiates the bill, and receives payment of its contents for his constituent. Or John draws a bill on himself, payable at a certain date in Glasgow, which, being presented after his arrival there, is retired by him. Bills may also be drawn payable to the drawer, or order; in which case, there are only two parties; but these partake more of the nature of promissory notes, than of the proper bill of exchange.

When a bill is drawn in a country using one species of coin or money of a certain value, and made payable in another, using a different species, it is strictly and properly a bill of exchange. When I give 100l. Sterling, and receive a bill for 140l. Jamaica, or 108l. 6s. 8d. Irish currency, the exchange is strictly at par; for that is the real and intrinsic difference betwixt the money of the two countries. Whatever is given above, is a premium; and whatever is given under, is a discount; the rate of which varies with a thousand circumstances, and is in a perpetual state of fluctuation. The money of each country, besides its positive value, possesses a relative value, when compared with the money of other countries; and it is this relative value which exchange establishes. Whence it arises, that besides the actual

value,

value, according to the difference of currencies given for bills from one place on another, an advance or premium is sometimes given, and sometimes a deduction from the actual value is made. This rate of premium, or discount, is generally termed the exchange between the countries, and is blended or confounded with the proper exchange, proceeding from the different currencies. In the same manner, there is an exchange, where there is no difference in the denomination of money. It is obvious, that bills drawn, to be paid in the same place or city, can produce neither exchange nor re-exchange between the inhabitants of that place or city; they are mere documents of debt, and a medium of circulation. But when bills are drawn on places more remote, though in the same kingdom, and using the same currency, they are often above what is called the money price; and the difference between the value at which they pass, and the money price, is the rate of exchange. When the demand for payments is greater in one place than in another, the bills of the place where the payments are to be made, bear a premium or advanced price in all other places. For instance, payments to be made in London, from the country towns, always exceed the payments made from it. There is always, therefore, a great demand for remittances to that city. The Glasgow merchant having

dom. As documents of debt, their peculiar privileges and facility of transference give them a ready circulation. The great payments of our foreign and domestic commerce are made by bills on London; and a vast number of smaller bills circulate among the traders of the country, who successively indorse them to each other.[3] Bills, therefore, as a transmissible representative of property, answering all the purposes of specie, form a cheap and convenient circulating medium; and, by that means, tend to promote the increase, and to facilitate the operations of the trade and commerce of the nation.

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to the same extent, or the national credit supported. The Carthaginians, in their long wars, are said to have been reduced to similar expedients, and that, to transact their commerce, they employed a fictitious money, something like our exchequer bills. 'Carthage, exhausted by the large sums which she was obliged to pay to her auxiliary troops, conceived the idea of fabricating, without any metal, a species of money at least as difficult to forge as a London bank note. The author of the dialogue entitled Eryxias, which has sometimes been attributed to Plato, and sometimes to Æschines the philosopher, observes, that the Carthaginians enclosed some unknown object in small sealed bags, which, being guaranteed by the republic, had among merchants a stipulated value, corresponding exactly to the paper money of the moderns.'—Roch. Phil. sur les Grecs, tom. i. p. 336. For the operations of the Romans on their money, see Esprit des Loix, liv. 22. ch. 11. 12. & 13.

[3] Thornton on Paper Credit.

LETTERS OF CREDIT are intimately connected with Bills of Exchange in their origin and object. In the course of time, and in their application to mercantile purposes, some change has been introduced in their form and use. It was therefore thought proper to treat of them in a supplementary chapter.

CHAP. I.

DESCRIPTION AND FORM OF FOREIGN AND INLAND BILLS OF EXCHANGE AND PROMISSORY NOTES.

SECT. I.

Of Foreign and Inland Bills.

A FOREIGN bill of exchange may be defined to be an open order, or letter of request, by which a person in one country desires his correspondent in another, to pay a specified sum of money to a third party, or to any other to whom that third party shall direct payment to be made.[z] He who makes out the bill, is called the *drawer*; he to whom it is addressed, the *drawee*; and the person in whose favour it is drawn, the *payee*. If the drawee undertake to pay the amount, he is then called the *accepter*; and if the payee appoint another to receive the money, that other is termed the *indorsee*, as the payee is with respect to him the *indorser*; and any one who hap-

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[z] Stair, Inst. b. 1. tit. 11. § 7.—Ersk. Inst. b. 3. tit. 2. § 25.

pens for the time to be in possession of the bill, is called the *porteur*, or *holder* of it. The bill, before it be accepted, goes often by the name of a *draft*; and, after it is accepted by the drawee, it is frequently denominated his *acceptance*.

The period of payment is either at a certain distance after its date, or after sight, or at sight, or on a certain specified day, or on demand, according to the intention and agreement of the parties, and the distance of the countries in which they reside. Before bills of exchange came to be of such varied and extensive use as in the present day, it was customary to make all the bills from one place to another payable after the same interval of time, which was called the *usance* (usage) between the countries.[2] Usance is the period of one, two, or three months after the date of the bill, according to the custom of the places between which the exchanges run.[3] Double or treble usance, is double or treble the usual time, and half usance is half the time. When the usance is one or more months, and it is necessary to divide a month, half usance is uniformly fifteen days, without regard to the inequality of the months.[4] In France, usance of

[2] Savary, Lettres de Change, tome 1. liv. 3. ch. 5.

[3] Malyne, Cons. vel Lex. Mercat. part 3. c. 4.

[4] Marius, Advice Concerning Bills of Exchange, p. 93.

of one month is always thirty days.[5] Usance between Great Britain and Hamburgh, Amsterdam, Rotterdam, and Altona, is one calendar month from the date of the bill; between Great Britain and France thirty days;[6] between Great Britain and Cadiz, Madrid, and Bilboa, two months; between Great Britain and Leghorn, Venice, Rome, and Genoa, three months; between Great Britain and Russia, there is no established usance. Bills from Constantinople and Smyrna upon Great Britain, are usually drawn at thirty-one days. From North America at sixty days; and from the West Indies at ninety days. Upon a bill payable at usance the time is to be counted exclusive of the date of the bill.[7] Foreign bills are sometimes, but not often, drawn payable at sight, in which case, the bill ought to express that it is payable according to the course of exchange at its date.[8]

When a bill is payable months after date or sight, the time is to be computed by calendar, not lunar months. Thus, if a bill be dated 1st January, payable one month after date, the month expires on the 1st February. If dated the 28th, 29th, 30th, or 31st January,

[5] Ord. de Commerce 1673. tit. 5. art. 5.

[6] Poth. Traité du Change, n. 15. Boucher, Inst. Com. n. 1649.

[7] Poth. n. 15.

[8] Boucher, n. 1165.

nuary, payable one month after date, the month expires on the 28th February in common years; and in the three latter cases, in leap year, on the 29th. A bill dated 30th April, payable three months after date, is accordingly due on the 30th July, and ought to be protested on the 2d of August. [9]

Where a bill is drawn by days, the day on which the bill is dated, if payable after date, or accepted if payable after sight, is excluded. [1] Thus, if a bill payable ten days after date or sight, be dated or presented on the 1st of January, the ten days expire on the 11th. When a bill is payable weeks after date, the weeks must be reduced to days, and the time computed accordingly. If a bill therefore be dated 1st January, payable six weeks after date, the six weeks expire on the 42d day, exclusive of the day of the date, being the 12th of February; and the bill, by the addition of the days of grace, becomes due on the 15th.

The days of grace which are allowed to the person on whom the bill is drawn, were, it is probable, at first gratuitous on the part of the holder; whence, apparently, the term is derived. But the custom of merchants, and the decisions of courts of justice, have established, that the accepter is entitled to them as a matter

[9] 1803, Jarron *a.* Smith, Fac. Coll. No. 112. p. 246.

[1] Beawes, Lex Mercat. n. 252.—Poth. n. 13.—Kyd, Treat. p. 7.

matter of right.[2] The number of these days varies according to the custom of different places. The following is a list of the days of grace in different countries, given by Beawes in his Lex Mercatoria.

Great Britain, Ireland, Bergamo, and Vienna	3 days.
Frankfort, out of the fair time - -	4 do.
Leipsick, Naumburg, and Augsburgh -	5 do.
Venice, Amsterdam, Rotterdam, Middleburg, Antwerp, Cologn, Breslau, Nuremburgh, and Portugal - - - - - -	6 do.
Naples[3] - - - - - - -	8 do.

Dantzick,

[2] 1788, Charles *a.* Skirving, &c. Fac. Coll. No. 27. p. 44.—Poth. n. 187. 'Ce terme qu' accorde l'ordonnance,' ſays this writer, 'n'eſt terme de grace que de nom, parceque c'est *humanitatis ratione* qu'elle l'a accordé, et pour diſtinguer de celui porté par la lettre; il eſt réellement terme de droit, puiſque c'eſt la loi qui le donne.' It appears, however, that in Scotland, bills may be proteſted on *any* of the days of grace, though not on the day the bill is due. See Erſk. b. 3. tit. 2. § 33., and the deciſion above quoted. In England, a bill proteſted before the laſt day of grace, does not entitle the holder to exact the dues of the proteſt from the accepter, who is allowed till the laſt day to pay it; and this, it is believed, is alſo the conſuetudinary law of Scotland.

[3] According to Boucher, bills on Naples payable at ſight, have no days of grace, and others have only three; and at Leipſick a bill muſt be proteſted the day it is due, p. 268.

Dantzick, Konningsberg, and France -	10 days.
Hamburgh and Stockholm - -	12 do.
Spain - - - - - -	14 do.
Rome - - - - - -	15 do.
Genoa - - - - - -	30 do.

In Milan there are no fixed days of grace; but the holder of the bill may grant some days, provided it be done before a notary.[4] Bills on Geneva have five days of grace. At Leghorn, when a bill falls due it is commonly retired on what are called the pay-days, which are twice a week, Tuesdays and Fridays. Thus, a bill due on Saturday is payable on the Tuesday following; or, if due on Wednesday, is payable on the subsequent Friday. The payment is generally made at the *stanzas*, places appointed for the purpose, where the rate of exchange at the time is ascertained. But in several of the places mentioned in the above list, the days of grace are not claimed or taken. In Hamburgh, for instance, a merchant in good credit retires his bill the day it falls due; and to allow it to lye over during the days of grace is thought discreditable. No diligence, however, can proceed on the bill till the days of grace are expired, and the day on which the bill becomes due makes one of these days, which is the case no where else. In Great Britain, Ireland, France, Geneva,

[4] Boucher, p. 269.

Geneva, Amsterdam, Rotterdam, Antwerp, Middleburgh, Dantzick, and Koningsberg, Sundays and holidays are always included in the days of grace. Bills on Russia have ten days of grace, and unless a protest be taken within the ten days, the holder loses his right to the *cambio*, or eight per cent. exigible on protested bills. In that country, bills are looked upon more as documents of debt, than as possessing those peculiar privileges, with which, in order to expedite and favour the affairs of commerce, they have by other nations been invested. The native Russian merchant, therefore, is extremely careless about the protesting of his bills, and is always inclined to avail himself of the days of grace. He is animated with little of that punctilious regard for his mercantile honour and credit, which is the laudable characteristic of a respectable merchant in other European states, and especially in this country.

In Scotland, when the third day of grace happens to be Sunday, the bill must be protested (if not paid) on the Saturday preceding. [5]

The different calendar computations of time must also be attended to in regard to foreign bills of exchange. Most, if not all the countries with which Great Britain is in the habit of commercial intercourse, have

[5] 1786, Smith & Payne *a.* Laing, Arthur & Co.; Fac. Coll. No. 282. p. 434.

have now adopted the Gregorian, or new style, in computing time, except Russia, where the Julian or old style (which is at present twelve days behind the new) is still used.

When a bill is drawn payable after date upon a place using a style different from that observed where the bill is drawn, the time, it is said, must be computed according to the style of the place drawn upon.[6] If this were the case, a bill drawn from this country on Petersburg, dated 1st April, payable one month after date, would not be due till the 1st of May there, which corresponds with the 13th of May here; while a bill drawn from Petersburg on this country, dated 1st April, payable one month after date, would be due on the 1st of May here, which corresponds with the 18th of April there. A difference of twelve days therefore, would evidently take place, from the modes of drawing on the two countries. To obviate this disparity, and equallze the difference of time arising from the use of the two calendars, it seems necessary and reasonable that the date should be regulated by the style of the place where the bill is drawn, and calculated back, or carried forward, to correspond with that style. And this, accordingly, is both conformable to the opinion of other authors[7] and to the general

[6] Beawes, n. 251.—Poth. n. 155.

[7] Mar. p. 89.—Bayley's Sum. p. 68.—Kyd, p. 8.

ral practice. For example, on a bill drawn on Petersburg dated 1st April old style, and payable here one month after date, the time must be computed from the 13th April new style; and, on a bill dated 13th April new style, payable at Petersburg one month after date, from the 1st April old style. The date is sometimes made both according to the old and new style, the one being written above and the other below, with a small line between them, thus.

$\frac{1}{13}$ N. S. } April 1807. Or 1st April O. S. $\frac{1}{13}$ April.
Q. S. }

This mode was also for some time practised by the French in drawing bills on other countries. The date was first put according to their modern calendar, and then the corresponding date according to the style of the place drawn upon, thus.

Bordeaux le { premier Vendemiaire an 12. / 6 Octobre - - 1803. }

They have now, however, returned to the use of the common calendar in dating and indorsing their bills, which, it is presumed, they find a great deal more convenient.

As a precaution against the risk of miscarriage, foreign bills of exchange are usually drawn in sets; that is, two or three, and sometimes four bills are drawn, of the same tenor and date, each of which contains a condition that it shall be payable only so long as the others remain unpaid. When a bill thus consists

consists of a set, or several parts, each part must be delivered to the person in whose favour it is drawn, unless one is forwarded to the drawee for acceptance, in which case the others must be delivered; otherwise difficulties may arise in negotiating the bill, or enforcing payment.[8] These bills are generally transmitted by different conveyances; and any one of them being paid, the others are of no effect. But if the drawer should have only given one bill, he will, if it should be lost, be obliged to give another of the same tenor to the loser;[9] in which case, however, he ought to be careful in exacting security against the reappearance of the first; for, if it comes into the hands of *bona fide* holders, he may be subjected in payment of both.[1]

INLAND BILLS.

An inland bill of exchange, is a bill drawn and made payable in the same country. Inland bills differ chiefly from foreign, in this respect, that they are usually drawn single, there being but one of the same tenor and date, and have often but two parties to them, the drawer and accepter.

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[8] Molloy, b. 2. c. 10. § 10.

[9] Poth. n. 39.

[1] 1799, Lambton & Co. *a.* Marshall, &c. Fac. Coll. No. 132. p. 302.

The facilities given to commerce by the use of foreign bills of exchange, procured them, at an early period, peculiar privileges in all the European states. The parties being of different kingdoms, questions concerning these bills came to be decided according to the received usages of trading nations; and the law with regard to them was, of course, derived more from the general practice of mercantile people, than from any existing civil code, or municipal regulation. From being used in carrying on foreign commerce, bills came soon to be employed in transacting the internal trade of the country. But in that capacity their operation was at first much more confined than at present; and, both in England and Scotland, it was some time before they were considered as entitled to the same privileges with foreign bills. At length, however, a growing conviction of their utility in all mercantile dealings, seems to have induced the legislature of this country, in 1696,[2] to put them on the same footing with foreign bills; and since that time, all bills of exchange, inland or foreign, have been considered as possessing the same force and privileges by positive law; and the custom of merchants relative to the one, held as applicable to the other.[3] In England,

[2] Act 36. § 6. Parl. Will. III.

[3] 1748, Tudhope *a.* Turnbull, Kilkerr. (Bill of Exch.) No. 16. p. 81.

land, inland bills were privileged in 1697;—9 and 10 Will. III. cap. 17.

An English inland bill has generally three parties to it,—the drawer, accepter, and payee; whereas, in Scotland, most of the inland bills have at first but two parties,—the drawer and accepter; and they are made payable to the drawer or his order. A Scotch inland bill of this description, therefore, bears a nearer resemblance to a promissory note, than to anEnglish inland bill; and seems evidently to have been adopted, in this country, to supply the place of promissory notes, which were not privileged till long after they were so in England. It was looked upon more as a document of debt, than a proper bill of exchange, among merchants; and was often used as a form of security by people not in the least connected with trade.

It may be observed, in general, that no precise form or set of words is necessary to constitute a bill of exchange. Of all obligations, they have, for the sake of commerce, been most favoured by our law courts, and effect given to them in whatever shape they have been made out, provided the true nature of a bill was preserved. It is, however, advisable, in drawing a bill of exchange, that the following points be attended to, some of which are essential to its validity. 1*st*, That, in certain cases, it be on a proper stamp. 2*d*, That the date be correct. 3*d*, That the place

place where it is drawn be mentioned. 4*th*, That the sum be expressed distinctly, both in figures and words, and no blank left to allow of any alteration or augmentation of the sum. 5*th*, That the time of payment be clearly expressed. 6*th*, That it contain an order or request to pay. 7*th*, That in the case of foreign bills drawn in sets, each bill contain the proviso, that it shall only be payable in case the others are not paid. 8*th*, That it be distinctly specified to whom the bill is payable, and the name properly spelled. 9*th*, That in all inland bills, a place of payment be inserted. 10*th*, That, in certain cases, value received be expressed. 11*th*, That, in particular circumstances, it be stated whether the bill is to be paid with or without further advice. 12*th*, That the drawer's name be clearly signed. 13*th*, That the bill be properly addressed to the drawee. And, *lastly*, That in foreign bills, it be observed that the place where the drawee lives be correctly described. All which will be better explained by the following forms.

FORM

N°. I.

Exchange for L. 500 Sterling. *Glaſgow, 6th February* 1806.

At uſance, pay this our firſt of exchange, (ſecond of the ſame tenor and date not paid), to the order of Meſſrs Hamilton Smith & Co., the ſum of five hundred pounds Sterling, at the exchange, as per indorſement, [a] value in account, as adviſed by

To Meſſrs Denovan & Spaden, merchants, Hamburgh. DALRYMPLE & ELLIS.

Payable at

N°. II.

London, 8th May 1807. Exch. p. L. 500. Ster. at 34s. 8d. p. pound.

Three months after date, pay this my ſecond of exchange, (firſt of the ſame tenor and date not paid), to the order of Mr G. Van Haveracht, the ſum of five hundred pounds Sterling, at 34s. 8d., value in account, as per advice.

To Meſſrs Flor & Co., merchants, Hamburgh. WM. RICHARDSON.

N°. III.

L. 250 Sterling. *Glaſgow, 7th April* 1807.

Twenty one days after ſight, pay this my only bill of exchange, to Mr John O'Reilly, or order, two hundred and fifty pounds Britiſh, at the current exchange, value in account, and place it to my account, without further advice from

To Mr John Beresford, merchant, Dublin. JOHN BROWN.

13. April. Accepted, J. BERESFORD.

FORM OF AN INLAND BILL.

L. 130 Sterling. *Edinburgh, 6th May* 1807.

Three months after date, pay to me or my order, at my ſhop here, the ſum of one hundred and thirty pounds Sterling, for value received.

To Mr Alexander Campbell, merchant, Leith. WM. DREW.

ALEX. CAMPBELL. [b]

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[a] As the rate of exchange of the day cannot be known till information be received from London, the bill is generally ſent thither, and the rate marked there on the back of the bill.

[b] For additional forms of bills, foreign and domeſtic, ſee Appendix No. I.

SECT. II.

OF PROMISSORY NOTES.

A PROMISSORY NOTE is a direct obligation in writing, by which one person promises to pay to another, or to his order, a certain sum of money, within a specified time, or on demand. With the exception of promissory notes admitting of no acceptance, the parties to them are similar to those concerned in a bill of exchange. Before a promissory note is indorsed, the grantor of it is, with respect to the person who receives it, to be considered as occupying the place both of the drawer and drawee of a bill. When the note is indorsed, the indorser corresponds to the drawer; the grantor to the drawee or accepter; and the indorsee to the payee, or party to whom the bill is made payable. In France and England, [6] promissory notes were put upon the same footing

[6] In France, the law of promiſſory notes (billets de change) is regulated by the ordonnance of 1673, &c. In England, promiſſory notes were put on the ſame footing with inland bills by 3d, 4th Anne; made perpetual by 7th Anne, c. 25. § 3.

footing with bills of exchange, long before a similar privilege was extended to them in Scotland. It has been well observed by an English writer, [7] that as commerce advanced in its progress, the multiplicity of its concerns required, in many instances, a less complicated mode of payment, and of obtaining credit, than through the medium of bills of exchange, to which there are in general three parties. A trader, whose situation and circumstances rendered credit from a merchant or manufacturer who supplied him with goods absolutely necessary, might have so limited a connexion with the commercial world at large, that he could not easily furnish his creditor with a bill of exchange on another man, while his own responsibility might be such, that his simple promise of payment, reduced to writing for the purpose of evidence, might be accepted with equal confidence with a bill on another trader. Hence the introduction of promissory notes; and hence, as before observed, the expedient devised by the Scotch merchants, of drawing their inland bills, so as to be the same in effect with promissory notes, while their form secured to them, at the same time, all the privileges of bills. By these inland bills, almost all the purchases and mercantile dealings in Scotland have for a long period been transacted; and though promissory notes were, in the 12th

[7] Kyd, p. 18.

12th year of the reign of his present Majesty, indued by statute [g] with the same privileges as bills of exchange, they still continue to be in general use.

As bills, therefore, and promissory notes, may now be considered as virtually the same with respect to their privileges, the rules and decisions relative to the one may be held as applicable to the other, which will render it unnecessary to treat of them separately. In the subsequent pages, of course, they will be classed together; and, unless in some particular cases it is found requisite to draw a line of distinction between them, it may be laid down, in general, that the law, when stated to have been settled with respect to the accepter of a bill, is to be considered as applying to the grantor of a note; when with respect to the drawer of the bill, then to the first indorser of the note; the subsequent indorsers and indorsees bearing an exact resemblance to each other.

FORM

[g] By a temporary statute, 12th Geo. III. c. 72., made perpetual by 23d Geo. III. c. 18. § 55., it is enacted, § 56., 'that from and after the 15th May 1772, the same diligence and execution shall be competent, and shall proceed upon promissory notes, whether holograph or not, as is provided to pass upon bills of exchange and inland bills, by the laws of Scotland; that promissory notes shall bear interest as bills, and shall pass by indorsation; and that the indorsers of promissory notes shall have the same privileges as the indorsers of bills, in all points.'

FORM OF THE PROMISSORY NOTE.

L.100 Sterling. *Glasgow, 7th April* 1807.

Three months after date, I promiſe to pay Mr William Middleton, or order, at his counting-houſe here, the ſum of one hundred pounds Sterling, for value received.

WM. JOHNSTON.

L.150 Sterling. *Glasgow, 7th April* 1807.

By equal inſtalments, [a] at three, ſix, and nine months after date, I promiſe to pay James Denniſtown Eſq. or order, at his counting-houſe here, the ſum of one hundred and fifty pounds Sterling, for value received.

WILLIAM SPENS.

BESIDES the promissory notes above described, used by merchants in their dealings with each other, there are promissory notes of another description, payable

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[a] In the caſe of the Carron Company *a.* Muirhead, 1796, February 26th, it was doubted whether a promiſſory note, payable by inſtalments, has the ſtatutory privileges of bills. The Court did not, in that caſe, decide the point; but it may be preſumed, from analogy, that ſuch notes are entitled to theſe privileges. Bills payable by inſtalments have long been uſed among merchants without challenge; and as, by the 12th Geo. III., promiſſory notes are inveſted with the ſame privileges as inland bills, it does not appear upon what grounds notes, payable by inſtalments, ſhould not have equal validity with bills, payable in the ſame manner.

payable to the bearer on demand, which may be reissued after payment. These, by way of distinction, are called cash notes, and may be circulated in any number by the public banks, or by private bankers, or by any other person whose credit is such as to make them be taken in payment. [1] Bank of England notes are considered as cash; and the notes of private bankers, when the issuers of them are known and in good credit, pass as ready money. Promissory notes received from bankers, for money deposited in their bank, though negotiable by indorsement, are seldom transferred in that way, being in general held as an acknowledgement and document of debt. They are granted by the bankers as a security for the money lodged; and commonly contain a clause to pay the stipulated rate of interest. [2]

CHAP.

[1] By 44th Geo. III. c. 98. § 20., it is declared, that no note, payable to bearer on demand, for more than 20l., (except notes of the Bank, or Royal Bank of Scotland, or the British Linen Company), shall be reissued, but shall be cancelled, on penalty of 20l.

[2] Bills and promissory notes were originally written on plain paper. By the 23d Geo. III., certain duties were imposed, which required that they should be written on paper duly stamped. By subsequent statutes, these duties were taken off, and others imposed in their stead. For the duties payable at present, by 44th Geo. III., see Appendix, N°. II.

CHAP. II.

OF THE COMPETENT PARTIES TO BILLS AND NOTES.

BILLS OF EXCHANGE, like other contracts, can only be valid when executed by persons qualified to bind themselves. Only such, therefore, as are capable of personal obligation, can be proper parties to bills and promissory notes. As the consent of parties is implied in every obligation, those who are by law deemed incapable of consent, as persons under age, or *non compos mentis*, cannot bind themselves by contract. Consequently, bills accepted or negotiated by pupils, idiots, and lunatics, have, with regard to them, no validity.

Married women, too, have no power to grant bills, or any other security bearing interest, so as to bind themselves or their husbands.[3] Nor can they, even with concurrence of their husbands, subject themselves

[3] 1749, Forreſt *a.* Earl of Sutherland, Dict. 3. 283.

selves to personal obligations of any sort during marriage;[4] and they are not liable to personal diligence.[5] In certain cases, however, a married woman is considered as having an existence independent of her husband, and, among other contracts, may bind herself by bill. 1. Where the wife has got a separate stock, exempted from the *jus mariti*, or husband's right of administration, she may bind herself to the extent of that stock. 2. Where there is a legal or voluntary separation, and a yearly sum has been settled upon the wife by the husband as a separate maintenance, her personal obligations, during their separation, are effectual against her; but no diligence can proceed on such obligations against her person.[6] 3dly, Where the husband having left the country, and the wife enters into trade, receives credit, and contracts debt in her own name, for the purpose of maintaining herself and family, she becomes liable for these debts, and diligence is competent against her for the recovery of them: 1789, Churnside *a.* Currie, Fac. Coll. N°.

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[4] Dict. v. 1. p. 398. 1761, Menzies *a.* the Creditors of Gillespie, Fac. Coll. No. 67. p. 151. 1772, Watson *a.* Robertson. 1791, Harvey & Fawell *a.* Trustees of Chessels, Dict. v. 3. p. 284.

[5] 1738, Gordon *a.* Pain & Husband, Kilker. 256. 1790, Chalmers *a.* Douglas & Husband, Fac. Coll. N°. 117. p. 238.

[6] Ersk. b. 1. t. 6. § 25.

N°. 78. p. 141. In the case just quoted, the husband having left Scotland in bankrupt circumstances, the wife engaged in trade, in order to earn a subsistence for herself and children. Being charged with horning for payment of a bill of exchange, she suspended, on the ground that a married woman cannot, by contract, subject herself to personal diligence. This plea, however, was entirely disregarded as inapplicable to a case like the present, where the debt had been contracted by a wife in her own name, while her husband was out of the kingdom. To refuse the ordinary legal compulsitors in such circumstances as these, would, it was observed, in the end, prove hurtful to the women themselves, by preventing them from gaining a livelihood in trade, at a time when their husbands could not afford them any support. The bill of suspension was refused by the Lord Ordinary, and the Court affirmed the judgment.

By the law of Scotland, all the moveable property of the wife (with the exception of articles of dress and ornament) falls, at marriage, under the *jus mariti*, or right of administration of the husband; and he becomes responsible for her debts. He is therefore liable for bills granted by the wife before marriage;[7] and, on the same principle, is entitled to pursue for payment

[7] 1725, Lesly *a.* Nicholson, Kames, R. D. v. 1. N°. 55. p. 105.

payment of bills granted before marriage in her favour. [8] It has also been decided, that a bill to a wife during marriage, bearing exclusion of the *jus mariti*, is effectual, where it is for money that does not fall under it. [9]

All deeds and contracts granted or entered into by a minor, without consent of his curators, are null with regard to him, but obligatory on the other parties, if judged beneficial to him. When a minor has no curators, his deeds are as effectual as if he had curators, and acted with their consent; but he is allowed to be restored against all deeds executed by him during minority, that are prejudicial. Where such deeds have been granted by a minor, with concurrence of his curators, or by one who had no curators; in both cases, he is entitled to do them away by an action of reduction within four years after his majority. [1] But though a minor has the privilege of restitution,

[8] 1738, Gilhagie *a.* Orr, Mor. Dict. 1421. Session Papers in Advocates' library.

[9] 1750, Mungal *a.* Calder, Kilker. (Husb. & Wife) N°. 17. p. 269.

[1] Though minors are precluded from restitution with respect to deeds which they have ratified or tacitly approved of after majority, it was found that a minor, who, in his nineteenth year, had granted certain bills jointly with his father, and had, within fourteen days after majority, settled

tution, in this way, against all obligations arising from contract, by which his interests may be injured. yet, when he engages in any trade or profession, he is not allowed to challenge deeds granted in the regular exercise of his business. Thus, bills of exchange accepted by a minor, who is a merchant or trader, are presumed to have been given for value advanced to him in the course of trade.[2] For were not this presumption admitted, a minor merchant could not deal otherwise than by ready money; which would in effect be saying, that a minor cannot be a merchant. Action, too, was sustained on a bill granted by a minor holding a commission in the army, for certain articles purchased by him from a tayman, though the articles were either entirely useless to the minor, or unnecessary in his situation, and though the persons liable by law to aliment him could not have been obliged to pay for them.[3]

A minor, though married, cannot be a party to a bill, if he be not a merchant.[4] But though a bill is drawn,

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settled accounts, in which these bills were stated as articles, was not, by this slight act of homologation, debarred from insisting for restitution *in integrum*: 1782, Melvil *a.* Arnot, Fac. Coll. No. 51. p. 80.

[2] 1732, Craig *a.* Grant, Dict. v. 1. p. 585. Grieve *a.* Tait, ibid. 585.

[3] 1782, Johnston *a.* Maitland, &c. Fac. Coll. No. 69. p. 107.

[4] Boucher, n. 1250.

drawn, indorsed, or accepted, by a person who cannot bind himself, it will nevertheless be valid against all those who are competent parties to the instrument.[5]

It may be laid down as a general rule, that no person can become a party to a bill, unless his name be on some part of it. Bills being negotiable solely upon the credit of the names which appear upon them, recourse cannot lye against one who passes a bill, of which he is neither accepter, drawer, nor indorser, though it should be afterwards dishonoured; as it is to be presumed, that he who took or discounted the bill, did so on the credit and responsibility of the names already upon it.[6] Any person, however, may draw, accept, or indorse a bill by his agent, factor, or clerk, which is termed by *procuration*;[7] and as this office is merely ministerial, minors, married women, and persons incapable of contracting in their own right, so as to bind themselves, may nevertheless be agents for these purposes.[8]

To authorise a person to act by procuration, it is said that a written commission or power is necessary;

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[5] Pothier, n. 29. Chitty's Treat. p. 21. Erſk. b. 1. t. 7. § 33.

[6] 1794, Harriſons *a.* Chippendale, Fac. Coll. N°. 141. p. 324. Kyd, p. 198.

[7] Beawes, n. 83.

[8] Manning's Law of Bills, p. 56. Chitty, 24.

tary; [9] but it would appear, from the custom of merchants, that it is sufficient if the authority be verbal, or if the person drawing, accepting, or indorsing the bill *per procuration*, was in the habit of doing so, and his acting in that capacity recognized by the principal.

Any one who, by procuration, negotiates, draws, accepts, or indorses bills, by subscribing his own name for his employer, effectually binds the principal, while he himself remains unbound. But if a person draw a bill in his own name, for behoof of another, without mentioning his character of factor, he is presumed to have interposed his credit for his constituent, and is personally liable. [1]

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[9] Beawes, n. 86. Mar. p. 104. Forbes, p. 15.

[1] 1782, Connel *a.* MacLelland, Fac. Coll. No. 141. p. 324. With regard to a factor's liability to the principal, it was found, that a factor, taking bills in his own name from his conſtituent's debtor, and the debtor becoming bankrupt, the loſs muſt be ſuſtained by the factor; 1739, Ainſlie *a.* Arbuthnot, Dict. 3. 202.

A factor in Scotland employed to ſell goods belonging to Engliſh merchants, was accuſtomed to lodge the price in a private banking-houſe, on an account in his own name, and to take from them bills drawn on their correſpondents in London, payable to himſelf, which he indorſed and tranſmitted to his employers, againſt whom he charged a commiſſion of 2½ per cent. Upon the bankruptcy of the drawers and accepters, he was found liable for ſuch bills

as

It is said by Beawes, that the possessor of a bill must admit of the acceptance of a procurator properly empowered

as had not been paid by them: 1795, Baines *v.* Turnbull, Fac. Coll. No. 187. p. 452.

A banker in Edinburgh having got orders to remit his correspondent's money, by a bill on the Bank of England, chose rather to remit it by a bill upon a private banker in London. The bill was taken out of the post-office by some unknown person, who, upon a false indorsation and receipt, got the money from the banker on whom the bill was drawn. It was found that the remittance by bill, on a private banker, was at the defender's own risk and hazard: 1730, Selwyn *v.* Arbuthnot, Dict. i. 58.

A mercantile company in Scotland sold grain for a merchant in London on a *del credere* commission, and took bills for the price. These bills they discounted with a private banking house in Edinburgh, then in good credit, from whom a bill drawn on London was taken for the amount, payable to the order of the Scotch company, who indorsed and transmitted it to their employer. The drawers and accepters of this bill having become bankrupt before the term of payment, the Scotch Company were found liable for it: 1795, Scott *v.* MacKenzie, &c. Fac. Coll. No. 149. p. 341. Affirmed upon appeal, 1796, Dec. 19.

A person having accepted a bill for a sum, as the price of a part of a ship which he had commissioned the drawer of the bill to buy for him, payable to the drawer or order, upon his delivering a vendition to the accepter, was found bound, by his acceptance, although the ship was bought by the drawer in his own name, and though he had not offered the vendition till after the ship had been damaged: seeing

empowered to accept; and that a procuration, either general or special, is sufficient for that purpose.[1] But an agent cannot delegate his authority, unless an express power be given him to that effect.[2]

When a merchant wishes to withdraw his procuration from any agent or clerk, who has been in the habit of drawing or accepting bills in his name, he will naturally be careful to give early notification of it to his correspondents, as, otherwise, he may be brought in to pay bills which he never meant should be accepted or drawn by him; notice in the Gazette not being accounted sufficient intimation, unless it be brought home to the knowledge of the person insisting on the want of it.[3]

The representative of a person deceased may become a party to a bill, by filling up his own name as drawer, if the bill be found blank in the drawer's name in the repositories of the deceased.[4]

Corporations may become parties to bills, by their agents or office-bearers for the time being; and the whole

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seeing that the constituent had never tendered the money, or demanded the rendition; 1711, Gibson & Wilson *a.* Leith, Dict. 2. 58.

[1] No. 87. Scarlet's Style of Exchanges, ch. 23. R. 10.

[2] Manning, p. 90. Chitty, p. 27.

[3] Chitty, p. 27.

[4] 1801, Tait *a.* Cranston, Session Papers.

whole partners of a company may be bound by the subscription of the copartnery firm. [6]

One of two copartners having accepted, 'for his own part,' a bill drawn on the company, it was found, that he was liable for the whole sum, as he ought to have accepted simply. [7]

When a bill is addressed to, and accepted by, more persons than one, the whole accepters are bound, jointly and severally, to the holder, whether it be so expressed in the bill or not; and the holder may exact payment from any one of them. [8]

When a bill is payable to two persons, neither of them can indorse it for more than half the sum; and payment by the acceptor to one or other of the holders, will liberate him. [9]

If a bill be granted by one person as principal, and by others as cautioners, and indorsed by the holder to any of the cautioners, the principal is liable for the whole contents. [1]

Where a bill is payable to three persons, two of them may pursue for the whole sum. [2]

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[6] 1766, Dewar *a.* Miller, Fac. Coll. No. 38. p. 63.

[7] 1712, Naughton *a.* Ritchie, Dict. v. 1. 98.

[8] 1761, Gordon *a.* Sutherland, Fac. Coll. No. 7. p. 11.

[9] 1685, Fountainhall, v. 1. p. 332. Harcarse, (Bills, &c.) No. 163. p. 36.

[1] 1742, Hill *a.* Scott. Home, No. 116, p. 328.

[2] 1744, Brodie, &c. *a.* Gordon, D. Falconer, v. 1, p. 26.

If there be several drawers who subscribe the bill, all are liable in case of a protest. [3]

If a factor of an incorporate company draws a bill on such company, and one member accepts it, the acceptance will not bind the company, because it is not a public act of the company, but a private act of the party. [4] And on the same principle, if several persons, each in his individual capacity, employ one factor, and he draws a bill on all of them, and one accepts it, the acceptance will not bind the rest. [5]

An authority given to one partner to receive debts owing to, and pay those due by, a copartnery concern on its dissolution, does not entitle him to draw a bill on one of the debtors of the partnership, and, on its being accepted, to indorse it in *name* of the company. [6]

The principal and immediate parties to a bill, are the drawer, accepter, and payee; but a person may indirectly become a party to it; as, where he accepts for the honour of the drawer, or any of the indorsers; which is called an acceptance *supra* protest. [7]

[3] Molloy, b. 2. c. 10. § 16.

[4] Ibid. § 19.

[5] Mar. p. 64. Beawes, pl. 228. Chitty, 29.

[6] Chitty, p. 30. Kyd, 33. See alſo 1788, Dalgliesh, &c. *a*. Sorley, Bell's Caſes, p. 487.

[7] Poth. n. 25, 26.

CHAP. III.

OF THE REQUISITES OF BILLS.

BILLS having been originally introduced to save the trouble and risk attending the carriage and transmission of money, and sanctioned by law on account of their convenience in trade, obviously require, that money alone should be their object, and that they should not contain any extrinsic quality incompatible with their primary use and destination. Were it otherwise, they would soon come to interfere with, and usurp, the place of deeds, which demand more formal solemnities to give them validity and effect. The payment of money alone, therefore, is the proper and genuine province of bills of exchange; and they are to be considered as bags of money, payable from hand to hand, as a necessary medium of trade.

It has, accordingly, been early ascertained, that bills must be for the payment of cash only, and not

for the performance of acts. Thus, bills, or precepts for the delivery of salt, meal, barley, and other fungibles,[1] were found not to possess the privileges of bills of exchange;[2] nor is it even certain, whether such bills will be sustained as probative writs.[3] It was however determined, that an obligation to deliver a fish debenture, in payment of a quantity of salt, was indorsable as a bill; being a transaction betwixt merchants, *in re mercatoria*, and agreeably to practice;[4] and the indorsee of a debenture, was preferred to a creditor of the indorser, who had, posterior to the indorsation, attached in the hands of the commissioners of the customs.[5]

On the same principle, that bills ought to be for the payment of money only, it is necessary that the obligation they bear to pay, should not be clogged with

[1] Whatever consists in quantity, and is estimated in weight, number and measure, as grain, wine, &c. is a fungible,—articles *quæ functionem recipiunt*. In this sense, coin, or money, is no doubt a fungible; but the term is to be here taken as denoting other fungibles, such as those mentioned.

[2] 1713, Leslie *a.* Robertson, Dict. v. 1. p. 95,—1715, Douglas *a.* Erskine, Dalrymple, No. 139. p. 193.

[3] 1729, Bruce *a.* Wark, Dict. v. 1. p. 95. Session papers in Advocates' Library.

[4] 1724, Hamilton *a.* Dalrymple, Edgar, Dec. p. 18.

[5] 1744, Hope *a.* Neilson, Dict. v. 3. p. 74.

with uncertain conditions and contingent events, which fall more particularly within the range of another class of contracts, differing from bills both in their origin and nature, and their form and constitution. The great advantage of bills, flows from their rapid circulation, and facility of negotiation; but their circulation and negotiability would soon be stopped, if they were issued into the world incumbered with contingencies and extraneous clauses; and the utmost perplexity would be introduced into commercial transactions.

The payment of a bill ought to be certain; for, were it not payable at all events, it would want one of the most essential qualities of a bill, whatever might be its effect as a voucher of debt. But if the event, on the occurrence of which it is to be paid, is not very distant, or such as will in all probability soon happen, so far a conditional bill will be sustained; nor will it be affected by the payment being directed to be made out of a particular fund. Thus, a bill drawn by a major-general, upon the paymaster of a regiment, 'ordering him to pay 33l. out of his clearings of the months of July, August, September, October, November, and December, in full of his and hautboies' dues from the said regiment, when received;' and by the drawee 'accepted when clearance comes to hand;' was found effectual, and preferable to a posterior arrestment of the same fund, by a creditor

of the drawer.[6] But an obligation to pay 10s. *per diem* to a person, until he should be provided with a company in the army, conceived in the form of a bill, was found null.[7] And it may be safely laid down in general, that bills made payable upon a contingency, or the happening of some distant event, are liable to challenge; both as being totally inconsistent with the proper nature of such documents, and because bills are now limited to a period of six years, with respect to the duration of their privileges; and if the time of payment was remote or contingent, the law of prescription could not be made applicable to them. Action was, accordingly, refused, on a bill made payable after the decease of the grantor, who lived thirty-seven years thereafter.[8]

It will not vitiate a bill, that it stipulate what would equally follow though it were not expressed; and therefore, a bill drawn for a balance at settling accounts, and expressing that it, when paid, with the drawer's receipt, should be a sufficient discharge of all claims

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[6] 1710, MacGibbon *a.* the Managers of the Woollen Manufactory at Newmills; Forbes, p. 422.

[7] 1721, Viscount Garnock *a.* Duke of Queensberry, Dict. v. 1. p. 95. See Campbell *a.* Campbell, Bell's Cases, p. 111.

[8] 1782, Stewart *a.* Fullarton, &c. Fac. Coll. No. 25 p. 45.

claims on the drawee, was supported;[9] nor will the bill be vitiated, by specifying the consideration for which it is drawn; as, 'for my growing crops of corn and grass, in the town of Musselburgh, which are instantly sold to you at the aforesaid price.'[1] But a bill containing a clause of substitution, as, 'Pay to me or order, or, failing me by decease, to my second son, Alexander Waddell, the sum of,' &c. was decided to be null, though a proof was allowed that the accepter had received value at the time he granted the bill.[2] Two parties having made reference of a lawsuit, they accepted bills to each other, which they deposited with the arbiter, to be given to the party who should be found in the right. These bills were found good, notwithstanding their conditional nature, inasmuch as they were to be considered as money, and, in this respect, not deviating from the proper nature of bills.[3] A bill too, addressed to one person as principal, and to another as cautioner, conjunctly and severally, and accepted by the latter, with the words 'as cautioner' subjoined to his acceptance, was held to

[9] 1738, Trotter *a.* Sheil, Dict. v. 1. p. 95.

[1] 1722, Wilson *a.* Smith, *Ibid.*

[2] 1739, Inglis *a.* Wiseman's representatives, C. Home, No. 130. p. 218.

[3] 1751, Clerk *a.* Kerr, Dict. v. 3. p. 74.

be valid, though it was objected, that a cautionary obligation could not be constituted by a bill. [4]

Any precise set of words is no more essential to the constitution of a promissory note, than to that of a bill. It is sufficient if the note, in point of fact, amounts to a promise of payment; and, in other respects, the same rules will apply to them as to bills, *viz.* that they must be made payable at all events; and that they must be for the payment of money only, and not for the performance of acts, or delivery of fungibles. The mere acknowledgement of a debt, without some words from whence an engagement to pay can be inferred, cannot be construed into a promissory note, such as the common memorandum, I. O. U. [5]

Promissory notes granted by bankers for money deposited, generally contain an obligation to pay interest at the understood rate of per centage. But it was long doubted, whether a clause of this nature would not vitiate a bill. And though there is little doubt that, in the present day, a bill stipulating the payment of interest would be supported; yet it is certainly more advisable to draw bills in the usual manner, for a principal sum merely, which bears interest by law after the day of payment; and any interest which may be

[4] 1753, Gibson *a.* Campbell, Fac. Coll. No. 93. p. 141.

[5] Chitty, p. 173.

be due from the date, can easily be included in the principal. The decisions concerning bills with clauses stipulating the payment of interest, are extremely various and discordant; and it is somewhat curious to trace their history.

In the case of Henderson *a.* Sinclair, which occurred in 1727, it was found, that a bill bearing interest from the date was good.[6] The same was found in the case, Dinwoodie *a.* Johnston, ten years afterwards;[7] and a similar decision was given in Gilhagie *a.* Orr.[8] Thereafter, the Court seems to have inclined to the opinion, that a clause of interest in bills was extrinsic, and inconsistent with their nature; and therefore, in the next question that appeared before them, the Lords sustained the objection to a bill, that it stipulated payment of annualrent seventeen days before the date: 1741, MacNeil *a.* Campbell, Dict. v. 3. p. 75. And, in the same year, a bill bearing annualrent from the date, was decided to be null, notwithstanding the many former decisions in favour of such bills; and a resolution was taken by the Court, to find all such bills void thereafter.[9] In the

[6] Dict. v. 1. p. 96.

[7] 1737, *Ibid.*

[8] 1738, *Ibid.*

[9] 1741, Paterson *a.* Finlays, Kilkerr. No. 5. p. 71. *voce* Bill of Exchange.

the very next case, however, which occurred for the determination of the Court, a bill conceived in the following terms, 'Nov. 11th 1741. Against Martin-'mas next, pay to me or my order, the sum of 250 'merks, with the first year's interest, twelve merks 'and a half, value in your hands;' addressed to and accepted by 'John Schaw in Glentore,' was sustained.[1] The Court, however, was much divided on the point; and it was carried by the narrowest majority. It was argued, that the amount of the year's interest was specified in the body of the bill, and that this was nearly the same thing with what merchants were accustomed to do every day, who, when they take their bills payable in six months, add the six months interest to the principal, and make the bill payable for the whole, which bears interest after the day of payment; whereas, here, the principal sum *only* would bear interest after the term of payment. In conformity with the above judgment, the Lords decided the two next cases, Lauder & Husband *a.* Murray, 1744,[2] and Gordon *a.* the King's Advocate, 1756.[3] There immediately follows, however, a track of decisions of an opposite nature; and, in Lockhart *a.* Mirrie, 1750,

[1] 1743, Schaw *a.* Ruffel, Kilker. No. 7. p. 71.

[2] Home, No. 264. p. 423.

[3] Dict. v. 3. p. 75.

1750,[4] Moncrief *a.* Moncrief, 1751,[5] and Douglas & Lindsay *a.* Brown, 1757,[6] it was unequivocally found, that bills containing a clause of interest were null. In the last decisions that appear, it would seem that the Court has reverted to what was first laid down as the law on the subject; and a bill[7] bearing annualrent, where the debt was acknowledged by the accepter, and one[8] containing a stipulation

[4] Falconer, v. 2. No. 170. p. 203.

[5] *Ibid.* No. 228. p. 277.

[6] Kames, Sel. Dec. No. 136. p. 192.—In reporting this case, Lord Kames makes the following remark. 'It was urged, that this bill was taken in 1725, when, by the decisions of the Court, it was published to the nation, that bills with interest from their date were legal securities; and therefore, to cut down this bill, is shewing a sovereign contempt for the decisions of the Court of Session, as not in the least degree to be trusted to or regarded. I proposed, therefore, that the bill should be sustained upon this particular medium, of being granted by the authority of the Court, and that an act of Sederunt should be made against such bills in time coming. The interlocutor, notwithstanding, was adhered to;—a lasting reproach upon the judges who voted for it, as being insensible or blind to the grossest act of injustice, viz. the forfeiting a man for doing what was declared at the time lawful by the sovereign court of the kingdom.'

[7] 1760, MacLauchlan *a.* MacLauchlan, Fac. Coll. No. 206. p. 369.

[8] 1790, Sword *a.* Blair, *Ibid.* No. 141. p. 280.—It is observed,

tion for interest from the date, such as is inserted in bankers' promissory notes, were both sustained.

But whatever difference of opinion may have been entertained with regard to bills with clauses of interest, those containing a penalty have been pretty uniformly rejected.[9] A bill is effectual, though bearing 'with penalty conform to law;' because, by law, there is no penalty due, and the words are therefore superfluous.[1]

The sum for which a bill is drawn, is generally placed at the top in figures, and afterwards written at length in the body of the bill, the better to prevent alteration.[2] It is not absolutely necessary that the sum be first expressed in figures, though always advisable; and when the sum in figures is different from that in the body of the bill, the latter is to be taken,

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observed, in reporting this case, that there is authority for stating, that what chiefly weighed with the majority of their Lordships, was the general understanding and practice of merchants regarding stipulations of interest in bills, as in bankers' notes and East India bills, which indicated that such of the later decisions as had set aside bills bearing a clause of interest were erroneous, and ought not to be followed as precedents. See App. p. 50.

[9] 1727, Innes *a.* Flockhart.—1743, Drummond *a.* Grahame, Kames, R. D. v. 2. No. 46. p. 74.

[1] 1741, Dict. v. 3. p. 75.; and 1760, Fac. Coll. No. 206. p. 280.

[2] Poth. n. 35. 99.

taken, *prima facie*, to be the sum payable; as, independent of a man's being more apt to commit a mistake in figures than in words, the words are the essential part of the bill. [3] Care should be taken, that no blanks be left, either at the top, where the figures are placed, or where the sum is written in the body of the bill, lest the original sum be augmented; and the safest method is to write over the stamp. For, when a bill already accepted and indorsed, is fraudulently altered from a smaller to a larger sum, in consequence of blanks being left in it, and is afterwards discounted, all the persons whose names are upon it are liable for the full sum which the discounter *bona fide* paid. [4] And in the case of Grahame *a.* Gillespie & Co. 1795, June 25th, where blanks had been left in a bill at the time of accepting, by means of which the drawer was afterwards enabled to increase the sum from 58l. 10s., to 458l. 10s., without giving the bill a suspicious appearance, it was found, that the acceptor was liable for the increased value to the indorsee who had discounted the bill. [5] It should also be attended to, that the bill be written on a proper stamp; for, if the stamp be inferior in value to what is required

[3] Beawes, n. 193. Mar. 138 & 139.

[4] 1793, Pagan & Hunter *a.* Wylie, Fac. Coll. No. 62, p. 136.

[5] Fac. Coll. No. 152. p. 345.

quired by the act, the instrument will be annulled; though it would appear, that if it be written on a stamp exceeding the appropriate stamp in value, it will be sustained.[6] As the time when a bill becomes due can only be ascertained from the date, it is necessary, in all cases, that bills be dated. In England, a date, it is said,[7] is not in general essential to the validity of a bill; and when there is no date, the time, if necessary to be inquired into, is computed from the day it is issued. In France, the want of a date, or an error in the date, or the omission of the place where the bill has been drawn, cannot be objected by the drawer who has written, or the drawee who has accepted, the bill.[8] In Scotland, the date is an indispensable

[6] 1804, June 21. Bowack, Fac. Coll. No. 168. p. 381. In this case, the bill, instead of being written on a stamp denoting a duty of 2s., was written on one denoting a duty of 3s. The Court considered the enactment of the stamp laws to be solely for the purpose of raising a revenue, and that there was no view of introducing new solemnities in the execution of writings; and therefore, provided the revenue be not injured, a stamp may be used of any value the grantor chooses. In an English case quoted, where a bill had been declared void as being written on a wrong stamp though of superior value, it was observed, that the stamp used was a *receipt stamp*, the duties on which might be differently appropriated. See Termly Reports, 22d June 1782, Taylor.

[7] Chitty, p. 41, 139.

[8] Pothier, n. 36.

pensable requisite; and bills without a date are null, if they have not all the solemnities required to other obligations.[p] The date ought in no case to be erased or altered; and action was refused on a bill where the date appeared *ex facie* to have been altered, though it did not appear by whom, or for what purpose, the alteration had been made.[r] But where an alteration appeared to have been made at the time of writing the bill, to correct a blunder, such as writing 1780 for 1800, the document was held as actionable.[s]

If a time of payment be not specified, the bill is to be held as a simple mandate to him to whom it is addressed, to pay a certain sum to the holder, who may be entitled to an ordinary action against the drawee, but not to diligence upon it as a bill.[t]

By the usual style and tenor of a bill, it is made payable to such a one, 'or order;' but these words are not essential to its constitution; and bills are indorsable and negotiable, whether they bear 'to order,' or not.[u] The person, however, to whom payment is to be made, should always be named. If the drawer has

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[p] Erſk. b. 3. t. 2. § 26. Fac. Coll. v. 2. No. 57.

[r] 1796, Murchie *a.* Macfarlane, Fac. Coll. No. 228. p. 530.

[s] 1802, Henderſon *a.* Hay, *Ibid.* No. 23. p. 46.

[t] Poth. ch. 2. § 2. n. 32.

[u] 1736, Crichton *a.* Gibſon, Dict. v. 1. p. 96.

has omitted to mention any person to whom the bill is to be paid, but has declared of whom he has received value, the equitable construction is, that payment is to be made to that person. [5] Bills payable to the bearer, are good in England, and are transferable by delivery. [6] Bills of this description were prohibited in France, on account of the fraudulent practices which they were supposed to engender; but, by a subsequent law, they were reestablished. [7] It was also usual in that country, to make bills payable to a person whose name was left blank, in order that the holder might fill it up when he chose, either with the name of that person, or of any other. As these bills, however, were employed for the purposes of fraud and usury, they were afterwards abolished. [8]

In Scotland, it was very customary, about a century and a half ago, for persons to execute bonds without filling up the name of the creditor, which got the name of blank bonds, and passed from hand to hand like notes payable to the bearer. These bonds were considered

[5] Poth. n. 31.

[6] Bayley, p. 12.—Chitty, 47.

[7] Poth. n. 224.

[8] Sav. Parf. Neg. t. 1. liv. 3. c. 7. Ces billets ont été trouvé d'une ſi dangereuſe conſequence par les inconveniens qui en ſont arrivé, particulierement dans les banqueroutes qu'ils ont été defendu par pluſieurs arrets de ſorte, que l'on en voit très peu à preſent.

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considered to be of the same pernicious effect as blank bills in France, as affording great room for fraudulent devices; because they excluded the debtor from pleading compensation or set-off against the bearer, upon debts due to him by the person to whom the bond had been originally delivered; and because, though the possessor of a blank bond was known, yet, as it was always in his power to transfer it to another, merely by delivery, his creditors could not by any diligence secure the sum it contained for their payment. All deeds therefore, in which the creditor's name is left blank, are declared null by 25. Parl. 1696.[9] From this statute, however, indorsations of bills and the notes of trading companies, are excepted.

Upon the principle of this act, it has been decided, that bills payable to the bearer are null as blank writs.[1] The subscription of the drawer, too, was long

[9] It is enacted, 'That for hereafter, no bonds, assignations, dispositions, or other deeds, be subscribed blank in the person or persons' names in whose favour they are conceived; and that the foresaid person or persons be either insert before or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before the delivery; certifying, that all writs otherwise subscribed and delivered blank, as said is, shall be declared null.'

[1] 1730, Walkinshaw's Executors *a.* Campbell, Dict. v. 1. p. 104.—Banker's notes payable to the bearer, are, as above mentioned, excepted from the act, and pass from hand to hand by mere delivery.

held to be a necessary requisite; and there are a multitude of decisions, finding, that bills wanting the drawer's subscription, were writs blank in the creditor's name, and therefore null by the act; which, though it excepted indorsations of bills, did not except bills themselves.[2] Of late, however, another doctrine has been sanctioned by the Court. In 1785, a bill drawn in these terms, 'Against Martinmas next, pay 'to Ann Drummond, or order, the sum of 1095 'merks, for value,' was sustained, though wanting the subscription of the drawer, whose name was mentioned in the body of the bill.[3] An objection to an accepted bill, that it was not signed by the drawer, was likewise repelled in the case of Hare *a.* Geddes, &c.;[4] the Court considering the objection to be obviated, by the circumstance of the creditor's name being both mentioned *in gremio* of the bill, and indorsed on it. In Fair *a.* Cranstoun, 1801, it was determined, that the representative of a person deceased, was entitled to insert his own name as drawer of a bill found,

[2] 1711, Brand *a.* Anderson, &c. Fountainhall, v. 2. p. 636.—1734, Neilson *a.* Russel.—1938, MacRaith *a.* Murdoch, Dict. v. 1. p. 96.—1748, Douglas, &c. *a.* Logan, Falconer, v. 2. p. 5.—1749, Bonnar *a.* Grant, *Ibid.* p. 56.—1777, Robertson, &c. *a.* Bissets.

[3] Drummond *a.* Creditors of Drummond, Dict. V. 3. p. 76.

[4] 1786, *Ibid.*

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quired by the act, the instrument will be annulled; though it would appear, that if it be written on a stamp exceeding the appropriate stamp in value, it will be sustained.[6] As the time when a bill becomes due can only be ascertained from the date, it is necessary, in all cases, that bills be dated. In England, a date, it is said,[7] is not in general essential to the validity of a bill; and when there is no date, the time, if necessary to be inquired into, is computed from the day it is issued. In France, the want of a date, or an error in the date, or the omission of the place where the bill has been drawn, cannot be objected by the drawer who has written, or the drawee who has accepted, the bill.[8] In Scotland, the date is an indispensable

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[2] 1802, Henderſon *a.* Hay, *Ibid.* No. 23. p. 46.

[3] Poth. ch. 2. § 2. n. 32.

[4] 1726, Crichton *a.* Gibſon, Dict. v. 1. p. 96.

ing the bill or note to have twelve months to run), and he has received interest for 5l. more than the principal sum advanced, which is above the legal rate. [1] But this doctrine is only applicable to bills, promissory

[1] Ord on Usury, p. 59. 68. With regard to what is accounted an usurious exaction in discounting bills, the following cases may be quoted. King's Bench, Guildhall, December 18th, 1793, Matthews v. Griffiths & Co. This was a *qui tam* action on the statute of usury. The defendants were bankers in Portsmouth, and, in several instances, had discounted bills for a Mrs Stewart, the proprietor of some silk works, at thirty days, at the rate of 5 per cent.; but, instead of giving cash, had given bills on London at three days sight. The fact was completely established by the evidence. Mr Erskine endeavoured to defend his clients, on the ground that it was the consent of both parties, and for the convenience of Mrs Stewart. The objection was overruled by Lord Kenyon, who said he considered it as usury, and no lawyer whatever would be of a different opinion. They ought to have deducted the discount for their bills. Manning, p. 66.

In the case Hammet v. Yea, subsequently decided, where several promissory notes were discounted by the plaintiffs, who were bankers, partly in cash, partly in account, and partly in bills on London at thirty days after date, and others of shorter dates; it was determined that there was nothing usurious in that mode of discounting. The defendant, in this case, had been asked by the discounters, how he would have the money; and had required bills on London for part of the amount. It was observed by Chief Justice Eyre, that had the bankers imposed this remittance on the borrower, as a term of the discount, it would have been usury. Ord, p. 60.

In a case where, on discounting a bill for the payee, the parties discounting it gave, in part payment, their acceptance of a bill, drawn on them by the payee, at three months date; it was taken for granted that that mode of discounting was usurious. *Ibid.* 66.

So it is in discounting a bill, if the party discounting gives goods in part, which are charged beyond their value. *Ibid.* 95.

G. took a note for 200l., when it had three months to run, in consideration of 197l.; and at three months end took another note for

promissory notes, and other negotiable instruments. On accounts current, indeed, as well as on bills discounted, a commission not exceeding ½ per cent., besides interest, may be charged by bankers. [1] It does not, however, apply to bonds and other deeds. [2]

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for 500l., on advancing 3l. for other three months. On being referred to a jury, it was found to be an usurious loan. *Ibid.*

[1] 1806, Walker, &c. *a.* Allan, Fac. Coll. No. 175. p. 396.

[2] The grantor of several annuities (amounting to 500l.) subject to redemption, being desirous of repurchasing them, drew a bill for 5000l., payable to the grantees, or order, *three years* after date. The bill was given for the original purchase-money; the arrears of the annuities; a sum to be paid instead of giving notice of repurchase; and a sum paid down in cash, amounting, in all, to 4250l.; the remaining 750l. being charged for *three years discount* on the bill. A bond was given by the grantor and his sureties, in lieu of the bill, and for the like amount. A question arose on the validity of the bond. The legality of discounting bills in the way of trade, was admitted by Lord Alvanley: and his Lordship observed, that if nothing more had been done in that case, than what always had been done by way of accommodation among merchants, the transaction was not usurious; but that the rule must be confined strictly to that sort of transaction; for that, if discount should be taken upon an advance of money, without the negotiation of a bill of exchange, it would amount to usury.

The case was considered by his Lordship to be a forbearance of 4250l. for three years, for which the party was to receive interest for 5000l. He also observed, that the jury were impressed with a notion, that a bill at three years was such as no reputable man would discount; though it was said that some East India bills of two years date had been discounted. That Lord Chief-Justice Eyre seemed to have thought that the length of the date of the bill was sufficient to afford a presumption that the discount was intended as a cover for a loan; and that, if we considered the effect of discounting bills at very long dates, the strength of that presumption would be manifest; for that, if the practice should be carried to a great length, the interest would annihilate

A bill for 8l., whereof part was money won at drafts, was declared null upon the 9. Anne; action being reserved to the holder against the debtor for payment of any furnishings or advances made to him separate from the game debt. [3]

A bill of exchange was given at Paris by Sir John Bland to Robinson, for 672l., of which sum 300l. was money *lent*, at the time and place of play, to Sir John; and 372l. *lost*, at the same time and place, by him to Robinson. In an action brought for payment of the bill, at the instance of the latter, against the administratrix

annihilate the principal. His Lordship therefore thought, that the discount of such a bill as that, not coupled with the transaction respecting the annuity, would have been almost sufficient to have afforded a presumption of usury; but coupled, as it was, with the redemption of that annuity, it was impossible to wink so hard as not to see what the real transaction was. His Lordship, accordingly, held the bond to be void.—Ord, 68.

Where a bond was given, in lieu of bills, to a person not privy to the usury of prior parties, it was accounted valid.

P, on discounting several promissory notes, took usurious interest. He afterwards obtained credit for them of the plaintiffs (his bankers), who had no knowledge of the usurious transaction between P and the defendant (the maker of the notes.) When the notes became due, the maker was applied to for payment; but the notes were destroyed by agreement, and a bond given by the maker to the bankers for the amount. The bond was held good by the whole Court. *Ibid.* p. 137. It was in this case observed by Justice Grose, that the consideration of the bond was the giving up of the bills; but the bond was not given for the money lent by P to the defendant.

[3] 1767, MacCoul *a.* Braidwood, Fac. Coll. No. 21, p. 105.

administratrix of Sir John, Lord Mansfield, after delivering at large the opinion of the Court, concluded with saying, 'As to the money won, we think it cannot be recovered. As to the money lent, it appears to have been fairly and *bona fide* lent, without any imputation whatever; and the plaintiff is entitled to it, both by the law of England, and by the law of France.'[4]

Value

[4] Robinſon *v.* Bland, 2. Bur. 1077.—Diſney's Laws of Gaming, p. 86.

In a queſtion relative to the validity of a bill granted as the amount of a wager loſt on a horſe-race, the Lords found, that the ſtatute 14. Parl. 1621, relative to game-debts, was not in deſuetude. By this act, it is declared, that wherever any perſon wins above 100 merks within twenty-four hours, upon cards, dice, or horſe-racing; the ſurplus ſhall, within twenty-four hours thereafter, be conſigned in the hands of the Kirk-Treaſurer, if in Edinburgh, or of the Kirk-Seſſion in the country, to be applied for the uſe of the poor.—1774, Maxwell *a.* Blair, Fac. Coll. No. 126. p. 338.—In England, horſe-racing is authorized under certain regulations, by 13. Geo. II. c. 19. And ſecurities given for money won at a horſe-race, where the ſtake is more than 5ol. are not void; becauſe, as the race itſelf is made lawful under theſe circumſtances, the conſequences ſhould be ſo too. Diſney, p. 28. But the perſons betting muſt be the proper *owners*. Wagers exceeding 10l., between third parties, fall under the ſtatutes 16. Car. II. c. 7. & 9. Anne, c. 14. relative to gaming debts, and are not recoverable. If the race itſelf be illegal, that is, if the ſtake be under 5ol., any bet upon it, though not exceeding 10l., is illegal alſo. A wager, to be good under the act, muſt be on *bona fide* horſe-racing, upon race grounds, and not on races againſt time: *Ibid.* ch. 3. *paſſim.* Though, it would appear, that a contract on a trotting match, was not conſidered as illegal: Robſon *v.* Hall, Peake's Cas. N. P. p. 127.—In Scotland, a deciſion the reverſe of this was given in Wordſworth *a.* Pettigrew, 1799. Fac. Coll. No. 123. p. 281.

Value given in smuggled goods is an unlawful consideration. Two persons having been engaged in a smuggling adventure, the one granted a bill to the other for the value of his share of the profits. The goods being afterwards seized, the Lords refused action for payment of the bill. [5] If the contracts arising from illicit transactions of this description, were sustained, it is evident that the Revenue, and general interests of the country, might be materially injured. The Court has therefore shown a disposition to cut down all deeds, of whatever denomination, granted for, or on account of, a smuggling or contraband consideration, if the parties were in the knowledge of the nature of the transaction. [6] Bills, for the price of smuggled goods, were accepted by Philp, payable to Potts, and indorsed by him to Sir William Forbes & Co., for behoof of Cullen & Co., to whose account they were immediately placed. Philp being charged for payment by their attorney, brought a suspension, and, after a discussion of the reasons, the Lords

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[5] 1776, Duncan *a.* Thomson, Dict. v. 4. p. 32.

[6] An heritable bond was granted for the price of smuggled goods, by a merchant in Scotland to his correspondent in Holland, who was accessory to the importation: the bond was assigned for value to a third person, who took infeftment on it. On the bankruptcy of the debtor in the bond, the trustee for his creditors brought a reduction of the security, on the score of its being *pactum illicitum*, and the Lords reduced it accordingly. *Ibid.* p. 33. Nisbet's Creditors *a.* Robertson. Bell's Dec. p. 349.

Lords suspended the letters *simpliciter*, thereby finding, that no action could be maintained on the bills. [7] In this case, a rule was adopted by the Court, that if goods were sold to a smuggler by a merchant settled abroad, whether a native of this country or not, and delivered on the spot, he can maintain action for them, though he suspected, or even knew they were meant to be smuggled into Britain. But if he was accessory to the smuggling, and thereby to an infringement of the laws of the land, (which he is bound to know as far as concerns his trade), he cannot demand the aid of the British courts for recovery of his debt.

A similar decision was given in Reid & Parkinson *a.* MacDonald, &c. where bills granted for smuggled goods were found not actionable in the hands of persons to whom they had been indorsed without value; it being shown, that the indorser of the bills was an agent of the persons by whom the goods had been furnished, who were privy to, and concerned in, the transaction. [8]

It was found, that no action could lye upon a bill accepted for payment of an apprentice-fee, where the indenture, which was the cause of granting the bill, was void by the eighth of Queen Anne. [9] It is no ground,

[7] 1793, Cullen's Attorney *a.* Philp; Fac. Coll. No. 49. p. 102.

[8] 1793, *Ibid.* No. 50. p. 103.

[9] 1754, Donaldson *a.* Fulton, Fac. Coll. N°98. p. 146.

ground, however, of reducing bills granted for an apprentice-fee, that the sum was not inserted in the indenture, nor the principal indenture stamped,—if the master have subjoined the sum to an extract of the indenture, and got the extract stamped on payment of the duty, though done after the death of the apprentice. [1]

In law, a bill granted for value is called an *onerous* bill: where no value has been received, it is called *gratuitous*.

Bills having been introduced for facilitating commerce, and not to convey gratuities, a legacy, or *donatio mortis causa*, cannot be effectually constituted by bill; [2] nor is a bill granted on deathbed a legal method of constituting a debt or legacy, even to affect moveables, in so far as the bill is gratuitous. [3] But the legacy may be effected, by the donor's granting a bill to a person in his confidence, who, at the same time grants equivalent bills to the intended donees,—the bill, in this case, granted to the interposed person, not being a donation, but given for a specific value, *viz.*

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[1] Shepperd *a.* Innes, *Ibid.* N° 267. p. 498.

[2] 1712, Fulton & Clark *a.* Blair, Dict. v. 1. p. 95.—1736, Weir *a.* Parkhill, *Ibid.*—1761, Wright *a.* Wrights, Fac. Coll. N° 20. p. 37.—1786, Dowie *a.* Millie, *Ibid.* N° 254. p. 309.

[3] 1724, Huttons *a.* Hutton, Dict. v. 1. p. 95.

viz. the equivalent bills accepted by him in favour of the donees, in the same manner as if the money itself had been paid to the latter. [4]

The objection to a bill, that it was granted on deathbed, without value, in order to constitute a legacy, and that it was not subscribed by the drawer till after the accepter's death, was not sustained as relevant against an onerous assignee. The bill, in this case, was delivered to a third party, before the accepter's death, for the drawer's behoof; and no deed, after delivery, is presumed to be a *donatio mortis causa*. [5]

A husband, on deathbed, gave his wife, in presence of witnesses, two bills, blank indorsed, desiring her to keep them for her own use. On the husband's decease, his executors having brought an action for delivery of these bills, it was found, that this was a donation betwixt man and wife, unrevoked, and that, therefore, the bills belonged to the relict. [6] And in

[4] 1782, Adam *a.* Johnston, Fac. Coll. No. 74. p. 113. In this case, it was observed on the Bench, that prior to the act limiting to six years the commencement of an action on bills of exchange, as they might have been brought into suit at any time within the period of the long prescription (forty years), there was evidently a much greater danger of frauds being committed by means of them, than there has been since that enactment. Hence, these documents are to be construed with less suspicion and strictness than formerly.

[5] 1761, Shaw *a.* Farquhar, Fac. Coll. N° 65. p. 149.

[6] 1753, Barbour & Blackwood *a.* Hair, *Ibid.* N° 62. p. 95.

the case, Provan *a.* Calder, a gratuitous bill of 100*l.*, granted on a promise of marriage, was sustained, although marriage did not follow. [7]

A bill, given as a reward of services, is good. Steel, in February 1790, granted to Wemyss, 'as a consideration for his services and trouble,' a promissory note for 500l., payable at the following Whitsunday. In payment of which, he, on the 7th June, gave him the following check or draft on the Bank of Scotland. 'On sight, pay to David Wemyss, or his 'order, five hundred pounds Sterling; which place to 'my account without further advice.' In an action of reduction brought by Steel's disponees, the Court sustained the promissory note and relative draft. [8]

Bills are often drawn for value *in account*, which is the ordinary style of drawing foreign bills by merchants who are in habits of commercial dealings with different countries, and have numerous transactions and current accounts with the persons drawn upon. A bill drawn and accepted in this way, does not always imply that the accepter had actually value in his hands at the time. On the contrary, it is a very frequent mode of drawing for the sole accommodation

[7] 1742, Kames, Rem. Dec. v. 2. N° 30. p. 46.

[8] 1793, Disponees of Steel *a.* Wemyss, Fac. Coll. N° 62. p. 95.

modation and behoof of the drawer. Neither does the remittance of a bill of this description to the correspondent, though made payable to him, transfer the property of the bill, unless he can show that he is creditor of the remitter on a balance of accounts. [9]

Bills should always be addressed to the person drawn upon, and his name and designation correctly expressed; but the want of a special address or direction is supplied by acceptance; for the address serves merely to mark out him to whom a bill is to be presented for acceptance, and when an accepter appears, even though the address be wanting, he is presumed to be the person the drawer had in his eye. [t] It is said, that if the drawer of a foreign bill omit to address it, but has advised his correspondent of his having drawn upon him for the amount, the bill may be presented to him, and protested if not accepted, so as to make the drawer liable in charges; and that the person so advised ought to accept, if he has funds of the drawer in his hands. [u]

Bills of exchange sometimes conclude with the words *as per advice*, in which case; a letter of advice from the drawer generally accompanies the bill. Such

[9] 1741, Forbes *a.* Fonnereau, Home, N° 175. p. 291.

[t] 1727, Grierson *a.* Sutherland, Kam. Rem. Dec. v. 1. N° 96. & 97. p. 189.

[u] Mar. p. 142.

bills cannot be safely paid until the letter of advice arrive; nor can the drawee safely pay, if the bill and letter of advice do not tally; [3] but he may, in all cases, pay without waiting for the letter of advice, *supra* protest, and will thereby keep the drawer bound. [4]

Bills are also sometimes made payable 'without further advice;' in which case, the drawer may pay whenever the bill becomes due. [5]

If a bill in the hands of the payee or holder, be altered or vitiated in any material respect, it is rendered null, and the parties are freed from the obligation thereby created.

Scaccia proposes this question. The holder of a bill of exchange falsifies it, and writes a larger sum than that which the bill bore. The falsification is made in such a manner as to deceive an attentive and intelligent observer. The banker, deceived by the appearance of the bill presented to him, pays the entire sum to the holder;—Ought he to have recourse upon the drawer for more than the sum for which the bill was originally and actually drawn? Scaccia decides in the affirmative. [6] Pothier thinks that the drawer

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[3] Malyne, ch. 6. obs. 8.

[4] Scaccia, Tract. de Commerciis et Cambio. § 2. gloss. 5. n. 358.

[5] Poth. n. 36. 169.

[6] Tract. de Com. § 2. gl. 5. quæst. 15.—And this far may be said

drawer is not liable in repetition (repayment) of the sum, in as much as the falsification of the bill was a fortuitous case, which he could neither foresee nor prevent, and with which, therefore, he could not be said to charge himself. But if the loss arose from any fault of the drawer in making out the bill in such a manner as to afford room for an alteration or addition, he conceives the drawer would be liable, as he ought to have drawn his bill in such a manner as to prevent falsification. From whence, says he, it results, that one ought not to decide indiscriminately, that the drawer is bound to indemnify the banker for the loss into which he was betrayed by the falsification of the bill; on the contrary, he is only liable to such claim of indemnity, when, by any fault on the part of him or his agent, he has given occasion to the falsification, by drawing the bill, without taking the proper precautions, which he might have taken, to exclude it. But if the falsification might have been discovered by a careful examination of the bill, the blame attaches to the banker in having paid it, as he

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said in support of his opinion, that according to the rules of the contract of mandate, the mandant is obliged to reimburse the mandatary for all disbursements to which the mandate has given occasion; provided the mandatary has not, by his own fault, disbursed more than was necessary. 'Mandator debet refundere mandatario quidquid ei inculpabiliter abest ex causâ mandati.' Paud. Justin. tit. Mand. No. 53. de Poth.

ought to have inspected it minutely; and he is not entitled to demand indemnification for a loss arising from his own fault or negligence. [7]

Boucher is of opinion, that the banker ought to sustain the loss, for accepting and paying the bill without a letter of advice, which he ought not to have done, and should therefore suffer for his imprudence. [8] But the perspicacity of Pothier cannot often be arraigned. The case might evidently occur, where no letter of advice could be given or required, as actually happened in that of Graham *a.* Gillespie & Co., 1795, where there was an example of both of the hypothetical cases mentioned by Pothier; and the Court decided in exact conformity with the principles laid down by that sagacious commentator. The accepter was found liable to indemnify the discounter for the whole sum, in a bill which he had accepted with vacant spaces; by means of which, the holder had been enabled to alter and augment the original sum; but he was not found liable to repay the contents of a bill, the falsification of which had given it a crowded and suspicious appearance, and might have been detected by an accurate inspection. The bill was considered to be vitiated *in toto*, and not to be actionable even for its original amount. [9]

In

[7] Part 1. ch. 4. Art. 3. p. 101.

[8] Inst. Com. n. 1110.

[9] Dict. v. 3. p. 76.

In the same manner, when a bill had been altered, in so far as the words 'on demand' had been erazed, and the words 'one day after date' substituted in their place, it was found that no action could lye on the bill so vitiated. The bill, by the alteration, was not the contract of the parties; and, independent of the bill, there was no pretence for the holder saying he was entitled to recover upon any other footing. By the vitiation, the bill was considered as annihilated, and it could not be restored, or made a ground of demand. [1]

[1] 1801, December 26. Lee v. Murdoch Robertſon & Co. This caſe was decided upon an appeal to the Houſe of Lords. It is not yet collected in any of the volumes of Deciſions. The following report, taken by a perſon on the ſpot, has been communicated to the author.

Robert Donald was a partner in a banking-houſe at Glaſgow, carried on firſt under the firm of Spiers Murdoch & Co., and afterwards under that of Murdoch Robertſon & Co. Mr Donald was likewiſe a partner in the mercantile houſe of Lee Rodger & Co., of which Mr Lee, the appellant's father, (now dead) was alſo a partner. Mr Donald, in his individual capacity, had a caſh-account with the bank of Spiers Murdoch & Co.; and, having overdrawn it, he, with a view to reduce the balance upon it, gave the bank, without the knowledge of Mr Lee, the acceptance of Lee Rodger & Co. for 1000l., payable in ſix months. This bill was not paid when it fell due; and afterwards a new bill, payable on demand, was taken by the bank, from Lee Rodger & Co. (ſtill without the knowledge of Mr Lee) for the principal and intereſt, amounting together to 1068l. 19s. 7d.; and the former bill was upon this occaſion delivered up. The ſecond bill was allowed to lye over for ſeveral years; but the holders, the reſpondents, at

But if the bill is altered before acceptance or indorsement, the accepter cannot take any advantage of the

at length brought an action for payment of it against Mr Lee the appellant. In the course of the proceedings, it appeared that the bill had been altered, in so far as the words 'on demand' had been erazed, and the words 'one day after date' substituted in their place; and upon the judicial examination of Mr Robertson, the cashier of the bank, it was acknowledged that the alteration had been made immediately before commencing the action, in order to found the bank in a claim for interest, which they could not have maintained on the bill as it originally stood. The Court of Session, after various procedings, upon the 4th of July 1798, pronounced the following interlocutor. 'Find the defender liable to the pursuers for the sum of '1000l. contained in the original bill granted by Lee Rodger & Co., 'with interest thereon; and remit to the Lord Ordinary to allow the 'pursuers to amend the libel to that effect, and to proceed and deter-'mine as to his Lordship shall seem just.' But parties preferred reclaiming petitions against this interlocutor; and upon the 11th February 1800, their Lordships pronounced this other interlocutor. 'Find, that the meaning of the Court, when they pronounced the 'judgment reclaimed against, was to sustain the claim of the pursuers 'to such an extent, so that the same should not exceed the sum of '1068l. 19s. 7d., and the interest thereof from the 23d February '1786, until payment; Find the defender Robert Lee liable in these 'sums accordingly; and, with this explanation, they adhere to their 'former interlocutor: And further, Find the defender liable in the 'full expense of extract, but in no other expenses, and decern.' From these interlocutors Mr Lee appealed to the House of Lords; and after counsel had been heard at great length, the Lord Chancellor observed, that had an action been brought in England upon the second bill, it would have been sufficient, laying all the other circumstances of the case out of consideration, to have stated, that the bill, in consequence of the alteration, was not the contract of the parties; and the respondents could not have recovered upon any other of the usual counts, such as money had and received, &c. because there was no pretence for saying that Mr Lee was debtor to the respondents independently

the alteration, as the consent of parties to the alteration is in this case to be presumed. [a] Action accordingly was sustained on a bill, in which the accepter, at the time of accepting, altered the sum from 60L to 50L., intimating, at the same time, that he chose to

independently of the bill. The transaction by which the first bill was pledged, was one between Donald and the respondents, to which Mr Lee was no party; at best, the first bill was to be considered as a voluntary obligation on the part of Mr Lee, which the respondents had abandoned. They had delivered back the bill; and, after that, could Mr Lee have been compelled to have renewed it? Could he have been subjected as under an engagement which the respondents had discharged? It appeared to his Lordship, that Mr Lee was in the same situation as if demand on both bills had been abandoned: and on what other ground could an action be maintained against him? His Lordship said he did not mean to give any opinion with regard to the first bill, but only to state, that very important defences might be offered to any action grounded upon it; and that it appeared to him that the appellant, by the course adopted, had been precluded from stating such defences. The first interlocutor seemed to proceed upon the supposition that the libel had been amended, and the defences overruled; which was contrary to the record as it stood, and to fact; and the last interlocutor, although it was difficult to understand it, appeared to proceed upon the second bill, as if it had been restored to its original state. But his Lordship again observed, that the alteration of that bill—the voluntary, if not criminal act of the pursuers, had annihilated it, and it could not be restored, or made a ground of demand. His Lordship concluded with moving, 'That the interlocutors complained of be reversed; but without prejudice to the pursuers bringing any action on, or in respect of, the original bill for 1000l. granted by Lee Rodger & Co., as effectually as if they had amended their libel according to the terms of the first interlocutor complained of.' Which was ordered accordingly.

[a] Beawes, n. 194. Mar. 140. 141. Scarlet, c. 10, R. 40.

to pay the interest, which was 10l., before payment of the principal sum; and in this state sent back the bill to the drawer. The objection of vitiation was made by the representative of the accepter; but, in respect of the special circumstances of the alteration having been made by the accepter himself, and that the sum was less, which was in his favour, the Court sustained the bill to the extent of 50l., the sum claimed. [3]

CHAP.

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[3] 1774, Laidlaw *a.* Park, Dict. v. 4. p. 412.

A bill is said to be of no force, if the place at which it bears to be drawn be false. Peter at Paris drew a bill on Alexander, payable to John, which bill he dated at Lyons, 23d May, 1777. When the bill became due, it was not paid. John pursued for payment. It was proved that Peter, the drawer, was at Paris, and not at Lyons, on the 23d May. The bill was annulled. Boucher, No. 1241.—Boucher, with some reason, questions the soundness of the principles on which this decision was given. If the drawer was a native of Lyons, he might have dated the bill, by habit or mistake, at Paris, without any intention to defraud or deceive.

CHAP. IV.

OF ACCEPTANCE.

THE acceptance of a bill of exchange, is an engagement to pay its contents according to its tenor.

The granting of a promissory note, is equivalent to the acceptance of a bill, for it is an obligation to pay the money for which the note is given; and inland bills payable to the drawer, being of the nature of promissory notes, the acceptance of them constitutes an engagement on the part of the accepter, similar to that of the grantor of a note. Nothing, therefore, of what is to be discussed under the title of this chapter, will be applicable to promissory notes; and very little of it to bills payable to the drawer. It will chiefly relate to foreign and inland bills, having three parties to them, a drawer, drawee, and payee; where the recourse of the last upon the first, in the event of the second

second refusing to accept, must be secured by a protest for non-acceptance.

The subject may be divided into four parts. 1*st*, Of the obligation upon, and steps to be taken by the holder, to procure acceptance. 2*dly*, Of the different modes of acceptance, and what constitutes an acceptance. 3*dly*, Of the effect of acceptance, and in what cases it may be refused. And, 4*thly*, Of the acceptance *supra* protest.

I. The holder of a bill ought, immediately on receiving it, to present it for acceptance at the usual house of business,[1] and in case of a refusal, protest it for non-acceptance;[2] for no days of grace are allowed prior to a protest for non-acceptance, as in the case of non-payment. It is customary, however, for the *porteur* to leave the bill twenty-four hours with the drawee, if he requires it, to enable him to discover, by examining his books, whether he has effects of the drawer in his hands or not; but the bill, it is said,[3] must either be accepted or protested, before the departure of the next post. It is generally admitted, that

[1] Mar. 61, 112.

[2] Molloy, b. 2. c. 10. § 15.—Sav. Tom. 1. liv. 3. ch. 5.—Chitty, p. 70.

[3] Malyne, ch. 6. obs. 1.—Beawes, n. 17.—Savary, Tome 1, l. 3. ch. 5.

that a bill payable at or after sight, should be presented for acceptance as soon as convenient,[4] both in order to fix the period when it is to be paid, and to preclude all reflections on the payee, in case of the drawee's insolvency and the money perishing in his hands, as well as to afford recourse on the drawer, which may be lost by an undue delay in getting it accepted. But it has been held, that this necessity does not apply to bills payable on a day certain,—as the time goes on, whether the bills be accepted or not; and that the holder is not bound to present them till the money is due.[5] In this country, a doctrine precisely the reverse has been maintained; and it has been urged, as a general point of law,[6] that a bill drawn at sight requires not the same rigorous negotiation with a bill payable at a day certain; that where a bill is drawn at sight, or so many days after sight, the holder has a discretionary power to present the bill sooner or later, as his exigencies require; that it is not to

[4] Ord. de Com. t. 5. art. 16.—Savary, Tome 2. par. 17.—Beawes, § 266.—Bayley, Sum. p. 59.—Chitty, p. 67.

[5] Molloy, B. 2. c. 10. § 16.—Beawes, ut supra.—Bayley, 59.

[6] Gordon *a.* James, Dict. v. 1. p. 101.—Andrew *a.* Syme, Dict. v. 3. p. 86.—Falls *a.* Porterfield, to be afterwards taken notice of.

to be supposed he will lye out of his money longer than is necessary; and that the delay in presenting it is favourable to the drawer, who cannot be debited with the money till his bill is presented. There certainly does appear to be the same necessity for immediate presentment in both cases, and even more so in a bill payable at a certain day, than in a bill payable after sight. In the one case, the precise day of payment and the period within which the bill must be negotiated in all its steps, is fixed and limited by the drawer himself, who therefore expects that the bill will either be accepted by the drawee within that time, or returned to him with advice of the dishonour; in the other, there is no precise restriction as to time, except that of the days or months to run after the presentment has been made by the payee; but in both cases, the drawer must rely on his bill being duly presented for acceptance, and on the holder being bound to exact diligence. For, suppose a bill drawn payable three months after date, and delivered to the payee, who duly presents it to be accepted, and, on a refusal on the part of the drawee, protests it for non-acceptance. The drawer is immediately advised of this, and put on his guard, both to adopt other measures for withdrawing his effects out of the drawee's hands before the expiry of the three months, and to provide funds for payment of the bill without trusting to his correspondent. But when the bill is

at once protested for non-acceptance and non-payment, at a distance of three months after being drawn, and returned abruptly on the drawer, his effects in the drawee's hands might not only be lost in the mean time, but he might be taken by surprise, and be at a loss to answer a demand coming upon him so suddenly; especially as, from his not hearing, for so long a period, of the bill, he might have had good reason to conclude that it was accepted and paid. Not to mention, that were a bill not presented for acceptance till the day of payment, the drawee, if he had received no advice, might happen to be unprepared for it, and be obliged to suffer it to be dishonoured; whereas, had it been duly presented for acceptance when it came to the payee's hands, and accepted by the drawee, he would thereby have subjected himself to payment, and in all probability, have provided funds to retire it when due, and thus saved both the honour of the drawer and the costs of protest, commission, reexchange, &c. By acceptance, a new debtor is added to the drawer, and a new security to the bill, which becomes a more negotiable instrument.[7] And as the drawer may sustain a loss by the holder's keeping it any great length of time, it ought, in all cases, to be presented as soon as possible.[8] It has, however, been

[7] Beawes, p. 491.—Scarlet, ch. 10. r. 32.

[8] Poth. n. 143.

been decided, that a bill payable at a day certain, need not be presented by the *porteur* for acceptance, before the day of payment;[9] and this, accordingly, is laid down as the law at present,[1] though it is evidently at variance with what has been stated and admitted to be the law with regard to bills payable after sight, *viz.* that they do not require the same rigorous negotiation with bills payable on a certain day. As a general rule, therefore, it is always adviseable that bills of every description, whether payable after sight or after date, be presented for acceptance within a reasonable time. What is to be deemed a reasonable time, must be determined from a consideration of the situation of the parties, the distance at which they reside, the course of post, and other circumstances. Generally, it may be presumed, that such time only will be allowed, as is sufficient to enable the holder conveniently to go and present the bill for acceptance, or to send it for that purpose.[2] But if a bill is sent for acceptance, it ought not to be suffered to lye for any length of time in the drawer's hands, without getting it either accepted or protested for non-acceptance.

Porterfield,

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[9] 1727, Ferguson *a.* Malcolm, Dict. v. 1. p. 101.

[1] Erik. b. 3. t. 2. § 32.

[2] Stair, b. 1. t. 11. § 7.—L'Art des Lettres de Change, ch. 6. § 6.—Forbes, 95.

Porterfield, on the 3d May, transmitted to C. & R. Falls, a bill for 129l., dated 2d May, drawn by Johnston of Glasgow, on Borthwick in Edinburgh, payable, three days after sight, to Porterfield, and by him indorsed to C. & R. Falls, who, on the 7th May acknowledged receipt of the bill, which they sent to Edinburgh for acceptance. Borthwick happened to be out of town when the bill arrived; but his clerk wrote to Messrs Falls, on the 11th May, that he was soon expected home, when the bill would be presented. On the 16th May, Messrs Falls sent a clerk to Edinburgh, to require that the bill should be either returned or accepted. Borthwick requested that it might be left a few days longer, which was done; but the bill not being returned, Messrs Falls, on the 5th June, again sent a clerk, with instructions either to get the bill accepted or protested. Borthwick delivered the bill to the clerk, with a protest taken against himself on the 31st May, for non-acceptance, and against the drawer and indorser for recourse; and on the 6th June, the clerk took a new protest against the whole parties, for non-acceptance, recourse, &c. and against Borthwick for damages, on account of his keeping up the bill without accepting it or returning it with a protest for non-acceptance. On the 7th June, intimation of the dishonour was made to Porterfield, who refused payment, on the ground of the bill not being properly negotiated. And the Court found, that from

the undue delay in getting the bill accepted or protested, recourse was lost. [3]

On the same principle, if a bill be left in the hands of the person drawn upon without being accepted, till news come of the drawer's insolvency, the loss will fall on the holder, whose duty it was to have looked after his bill, and got it either accepted or protested in due time; [4] unless the insolvency occurred after the bill had been redemanded. [5] If a person receives a bill, and instead of sending it by post for acceptance, keeps it till he himself sets out on a journey to the place where the drawee lives, by which means a delay is created, he loses his recourse upon the drawer or indorser. [6] It is incumbent on the bearer of a bill, when he acts as agent for the proprietor, in all cases to present it for acceptance as soon as possible, as it is only by acceptance that the person on whom the bill is drawn becomes debtor, and responsible to the holder; and if the affairs of the drawer should get deranged, an agent neglecting to present the bill for acceptance, would be liable in damages to his constituent. [7]

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[3] 1766, Falls *a.* Porterfield; Fac. Coll. No. 109. p. 374.

[4] Scarlet, ch. 10. R. 17.

[5] Dupuis, ch. 10. n. 8.—Scac. § 2. gl. 5. n. 335.

[6] 1773, Finlafon *a.* Ewing, Fac. Coll. No. 53. p. 136.

[7] Poth. n. 128.—Mar. 46.—Beawes, 117.

If a bill left for acceptance be lost or mislaid, either by the person on whom it is drawn, or by any of his servants, so that it cannot be returned to him that left it, either accepted or unaccepted, he who lost the bill (if he intended to accept, or had accepted it), should grant a note for payment of the sum in the bill at the expiry of the specified time; and, should this be refused, a protest ought immediately to be taken for non-acceptance, and forwarded to the drawer; and if the contents of the lost bill are not paid or satisfied by the time it becomes due, a protest for non-payment should at any rate be made. [8]

II. Acceptance is either written or verbal. In this country, verbal acceptances are not in use, as summary diligence could neither proceed on such acceptances, nor could they be proved otherwise than by oath of party. [9] But in England, a verbal, or parole acceptance, is as obligatory on the drawer as a written one. [1] When the bill is presented for acceptance, the

[8] Beawes, n. 17.—In proving the tenor of a loft bill, the purſuer of the action muſt condeſcend on a ſpecial *caſus amiſſionis*.—1780, Campbell *a*. The Creditors of the York Buildings Company, Fac. Coll. No. 106. p. 200.

[9] In France, too, the acceptance muſt be written. 'Celui ſur qui eſt tirée une lettre de change doit en faire l'acceptation par ecrit.' Ord. de 1673, tit. 5. art. 2.

[1] Bayley, p. 44.—Chitty, 76.—Kyd, 69.

holder is entitled to insist on such acceptance by the drawer, as will subject him, at all events, to payment of the bill according to its tenor;[2] and whether accepted or refused, the bill, as the holder's document of debt against the drawer, must immediately be returned. If the bill be payable after sight, and the drawee detain it some days without declaring his intention to accept, and afterwards incline to do so, the acceptance must be from the date of the first presentment.[3] The accepter has no liberty of adding any stipulation or quality to his acceptance, without the holder's consent; the acceptance must be simple and absolute, unclogged with any condition.[4] Nor is it safe for the holder to take a conditional or qualified acceptance, without authority from the drawer or last indorser to that effect, and if he does so, it is at his own risk and peril.[5] He may, however, take an acceptance for part of the sum, if he protest the bill for the remainder; it being for the drawer's interest to have his debt diminished.[6] In the same manner, taking acceptance

[2] Stair, b. 1. t. 11. § 7.—Poth. n. 47.

[3] Scarlet, ch. 10. R. 18.

[4] 1712, Naughton *a.* Ritchie.—1781, Campbell *a.* Campbell, Dict. v. 3. p. 77.

[5] Savary, tom. 1. liv. 3. ch. 6.—Forbes, p. 98.—Scarlet, ch. 10. R. 29.

[6] Molloy, b. 2. ch. 10. § 20.—Boucher, n. 1048.—Forbes, 99.

acceptance of a bill some days subsequent to the time of payment, and after it had been protested for non-acceptance, was found no wrong step of negotiation.[7] But though a bill may be accepted after the day of payment, so as effectually to bind the accepter, the drawer and indorsers will be discharged, unless due notice of non-acceptance, or non-payment, be given; and upon such acceptance, the accepter is liable to pay the bill on demand.[8]

By the French edict of Commerce of 1673, it is declared, that a qualified acceptance may be held as a refusal, so as to entitle the holder to protest the bill.[9] In England, if the holder receives a conditional, or qualified acceptance, and gives immediate notice to the other parties of the nature of the acceptance, they continue bound, in case the drawee should not pay.[1] In Scotland, if the holder suffer the acceptance to be qualified; if, for instance, he consent to prolong the day of payment, or to take a conditional acceptance, such as, 'if provisions come to hand betwixt and the day;' or, 'if goods or bills in hand raise the sum;' it imports his consent, so as to preclude him from protesting

[7] 1705, Nov. 14. Brown *a.* Hume.—Forbes, p. 99.

[8] Chitty, 78.—Bayley, 47.

[9] Tit. 5. art. 2.

[1] Chitty, p. 79.—Molloy, b. 2. ch. 10. § 20.

testing for non-acceptance.[2] But by this prolongation of the time of payment, the drawer cannot be affected if he has not given his consent to it; and therefore, the holder loses his recourse upon him in the event of the accepter's failure before the bill becomes due.[3] When the drawer is creditor of him who has given value for and remitted the bill, he may accept it 'to 'pay to himself,' provided the debt is liquid, and either due at the time, or falling due before the bill is payable, so as to be in a state of compensation;[4] nor is this, according to Pothier, to be considered a conditional acceptance, seeing it arises upon a transaction of the holder's own.[5] In the same manner, if a creditor of the holder of the bill, has, before it is presented, arrested the funds in the hands of the drawee, he ought, in that case, to accept in these terms,—'to 'pay to whoever shall be found to have best right to 'the contents.'[6] The drawee ought not to accept bills after he is aware of the drawer's failure, even though he possesses funds; because, after that event, one creditor of the drawer ought not to be paid in preference

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[2] Stair, b. 1. t. 11. § 7.

[3] Poth. n. 49.—Boucher, n. 1048.

[4] Boucher, n. 1387.

[5] N. 47.—Dupuis de la Serra, ch. 8.

[6] Boucher, n. 1045.—Poth. n. 47.—Dupuis, ch. 10.

preference to another.[7] Any person having accepted a bill, either absolutely or conditionally, may score out his acceptance before the bill be out of his hands, but not after having delivered it to the payee.[8]

The usual way of accepting a bill is, by writing thereon the word 'accepted,' or 'accepts,' and subscribing the drawee's name; or the name only is subscribed: and if the accepter be afraid of any alteration being made in the sum, he ought to write, 'accepted for the sum of so much.'[9] When a bill is payable after sight, the day on which it is accepted ought to be specified, because the time of payment is ascertained by the date of the acceptance. Bills payable at sight, or on demand, require no acceptance, and need only be presented for payment, and, if refused, protested; there being no days of grace on such bills.[1] In England, however, a bill payable at sight has the usual days of grace;[2] for a bill payable at sight is not there considered as a bill payable on demand, or included under the exception of the stamp

[7] Scac. § 2. gl. 5. n. 390.—Beawes, n. 139.—Poth. n. 96.

[8] Sav. tom. 1. liv. 2. ch. 5.—Boucher, n. 1041.—Dupuis, ch. 10. n. 6, 7.

[9] Boucher, n. 1017.

[1] Sav. tom. 1. liv. 3. ch. 5.—Scarlet, ch. 16. R. 8.

[2] Bayley, p. 66

act of 23. Geo. III. c. 49. § 4.[3] in favour of such bills. A bill on demand is payable instantly.[4]

When a bill is accepted by a partner of a copartnery, on the company account, he subscribes the common firm of the copartnery, or expresses that it is for self and partners, or for self and company.

Two persons in copartnery having commissioned goods from a factor abroad, and advised him by letter to draw bills for the same, and they would honour them; which he having done, one of the partners accepted in the ordinary way, and the other accepted for his own part; it was found that the latter was liable for the whole.[5]

If a bill be addressed to several persons jointly, who are not in copartnery, it may be protested for non-acceptance if any one refuse, although the rest accept.[6] And where the acceptance is by a factor or procurator, it is necessary to specify that he acts *per procuration*, or in quality of factor, otherwise he will be personally bound.[7] If the drawee be not capacitated to accept, and

[3] And now 44. Geo. III. c. 98. § 8.
[4] Manning, p. 8.—Chitty, 146.
[5] Naughton *a.* Ritchie, Dict. v. 1. p. 98.
[6] Molloy, b. 2. c. 10. § 18.—Mar. 64.—Beawes, 228.
[7] Ch. 2. p. 61.

and to bind himself to pay the amount of the bill, it may be treated as dishonoured.

A promise to accept, as 'leave your bill with me, 'and I will accept it,' or 'call for it to-morrow, and 'it shall be accepted,' is said to amount to a verbal acceptance.[8] The word 'seen' written on the bill, is also said to be equivalent to an acceptance.[9] And in England, writing the words 'accepted,' 'pre-'sented,' the day of the month, or a direction to a third person to pay the bill, will amount to an acceptance on the part of the drawee.[1] Acceptance is also sometimes implied; as when the drawee keeps up the bill after the same is redemanded.[2] But according to the English decisions, in order to constitute an acceptance by implication, there must be some circumstance, from whence it may be inferred that the drawee imagined he had induced the holder to consider the bill as accepted; and therefore, an answer given by the drawee, 'there is your bill, it is all right;' or the answer of a merchant to the drawer, that he would 'duly honour his bill,' will not, unless accompanied with circumstances that may induce a third party to take

[8] Molloy, b. 2. ch. 10. § 20.—Chitty, p. 77.

[9] Poth. n. 45.

[1] Bayley, p. 47.—Chitty, 75. & 76.

[2] Dupuis, ch. 10. n. 8, 9.—Poth. n. 46.

take the bill by indorsement, be construed into an acceptance. [3]

III. The effect of acceptance is, to give credit to the bill, and to render the accepter liable according to the tenor of his acceptance; and the very act of accepting, implies an acknowledgement that he has effects of the drawer in his hands. At least this presumption is good with regard to the holder, who is not obliged to inquire whether the drawee were the drawer's debtor at the time or not. By the acceptance, the drawee constitutes himself debtor to the payee, and to all the indorsers, who are thereby entitled to demand and exact payment from him. [4] When the bill is once accepted absolutely, it cannot in any case be revoked; and the accepter is in all events bound, though he were to hear the next moment of the drawer's bankruptcy, and though the failure was before the acceptance. [5] But if the drawee was not possessed of effects of the drawer at the time of acceptance, and was induced to accept by any mistatement or fraud on the part of the holder, this is a sufficient ground for refusing

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[3] Kyd, 74.—Chitty, 78.

[4] Boucher, p. 223.

[5] Poth. n. 118. 120.—Beawes, n. 23.—Molloy, b. 2, c. 10, § 28.

refusing payment of the bill when due. It is a fraud on the part of the holder, when, being in the knowledge of the drawer's bankruptcy, he conceals this circumstance from the drawee, in order that the bill may be accepted. And, according to Pothier, if the accepter can prove that the holder, when he presented the bill, was in the knowledge of the approaching failure of the drawer, he is entitled to be restored against the acceptance. If any extraordinaay means have been used in procuring acceptance, such as sending a bill by express to get it accepted, and the drawer's bankruptcy ensuing immediately afterwards, a presumption of fraud is afforded, sufficient to entitle the accepter to insist on the acceptance being annulled.[7]

When

[7] Poth. n. 118.

The accepter of a bill urged, in a suspension, that he had been fraudulently induced to put his name to it without full value, and insisted for a judicial examination of the holder, in which, if he should advance what was not true, the suspender would have an opportunity of disproving it, and so to invalidate his claim. It was observed on the Bench, that where circumstances of fraud are relevantly stated against the holder of a bill of exchange, and a proof offered, such previous examination as was here required might be highly expedient, both for superseding the necessity of further evidence, and for the better investigation of the truth. But to allow that method of proceeding, in consequence of general allegations like the present, would tend, in a great measure, to obstruct that free currency of bills of exchange which is so essential to trade. The Lord Ordinary refused the bill of suspension; which judgment the Court affirmed, after advising a reclaiming petition for the suspender, with answers.—1785, Fac. Coll. No. 227. p. 353. Goodfellow *v.* Madder.

When a bill payable after date is presented for acceptance, the drawee will not be allowed to deliberate whether he will accept or not till the bill fall due, upon the pretence of his not being at the time in funds for the drawer, but that he expects to be so before the bill is payable, and will then determine either to accept or refuse. If immediate acceptance be not made, the bill must be protested for non-acceptance;[8] as it is but reasonable that the holder should have it ascertained upon whom he is to rely for his money. It is usual, however, to retain the bill till the period of payment, and to transmit the protest only, with advice to the drawer; and sometimes both bill and protest are kept till the former falls due.[9]

A question naturally occurs here, whether a person, who is debtor to the drawer, is in all cases bound to accept the bills drawn upon him, to the extent of the debt he owes. Where a banker, or any other person, has received funds of the drawer, for the purpose of enabling the latter to draw upon him, there is evidently a tacit or expressed contract, by which the former is bound to accept and pay the drawer's bills, till the funds in his hands be exhausted. In the same manner, when the drawer writes to inquire

[8] Savary, tom. 1. liv. 3. ch. 5.

[9] Forbes, p. 97.—Sav. *ibid.*

inquire whether or not the person he means to draw upon will accept his bills, and receives an answer that they will be accepted, the drawee, in the case of a subsequent refusal to accept, is liable to the drawer for the loss and costs thereby occasioned. [z] But besides this, it is the opinion of most mercantile people, that a merchant, who is creditor of another merchant in a liquid sum arising from commercial dealings, has a right, without any express consent of the debtor, to draw a bill of exchange upon him for the amount; and that, if he dishonour the bill, he is liable in damages, costs, reexchange, &c. to the drawer, just as if he had agreed to the draft. Upon the common principles of law, no man can be made a mandatary without his own consent; and a creditor can only recover from his debtor by an ordinary action. It seems unreasonable, therefore, to suppose that the debtor should be subjected to a large expense, arising from a presumed obligation to which he has never given his consent. When I purchase a bale of broad cloth from a merchant of Leeds, or a box of muslins from a manufacturer of Manchester, I am liable for the price, after the expiry of the ordinary or stipulated period of credit; but I am not obliged to accept of bills drawn upon me for the price, without notice, and

[z] Scarlet, Style of Exch. ch. 7. R. 25.—ch. 11. R. 37.

and at random periods of payment. The general policy of merchants is to keep as small a portion as possible of their capital unemployed, or in an unprofitable state. Their funds, therefore, have usually a fixed and destined application relative to the bills which they know of, and have already upon the circle; and any unforeseen demand, or unexpected draft of which they have not been advised, and for which they have made no provision, must consequently derange their plans, and frequently expose such bills to the risk of being protested, and sent back dishonoured. The expenses incurred upon this transaction ought, one would think, to be borne by the creditor who rashly and unadvisedly drew the bill, and not by the debtor, who had received no intimation to prepare him for such an event. Many merchants, however, entertain a different idea on the subject; though it certainly appears to be inconsistent both with sound principles of law and with reason, that a bill should be abruptly drawn on a debtor, without his previous knowledge or consent, even in commercial matters. As this is a point of mercantile law, it must no doubt be regulated by the general usage; but though the practice may be admitted in regard to foreign bills, and in cases strictly commercial, there seems to be no adequate cause for allowing it in cases that are not commercial. It is laid down, in general, by one of our great institutional writers,

writers, that if a drawee refuse to accept, while he is possessed of the drawer's effects, he is liable in all the damages which the drawer shall suffer by that refusal; because the drawee was debtor to the drawer previously to the draft;[2] which doctrine, it is conceived, ought to be received with some modification. It is sufficiently established, that when a bill is drawn upon a person who is indebted to the drawer, or has effects belonging to him in his hands, he cannot afterwards pay to the drawer, whether he has accepted the bill or not.[3]

IV. If the drawee of a bill declines accepting, but wishes to prevent the return of the bill, and the expenses that this will occasion, he may accept for the honour of the drawer or indorser, which is called an acceptance *supra* protest;[4] or, in case of the drawee's refusing to accept in this way, any other person may do so. When a bill is to be accepted *supra* protest, the accepter must appear before a notary, and declare that he accepts such bill in honour of the drawer or indorsers, and that he will retire it when due; and must subscribe the bill thus, 'accepted *supra* protest, in honour of A. B.;' or, more briefly,

[2] Erſk. b. 3. t. 2. § 29.

[3] 1712, Gordon *a.* Anderſon, Dict. v. 1. p. 97.—Boucher, n. 1098.

[4] Molloy, § 29. 33.—Poth. n. 25.

ly, 'accepted S. P.,' by which acceptance he is effectually bound to the holder;[5] and a notorial instrument is made out, narrating the cause and nature of the acceptance. This instrument is essentially necessary in all cases of acceptance *supra* protest; for otherwise, an accepter might easily, after retiring the bill, make his acceptance a qualified one, by adding the words, 'accepted S. P. for the honour of the drawer and indorser,' if he wished, at any future period, to claim relief.[6] Before a bill be accepted in this manner, it is requisite that it be protested by the holder against the drawer for non-acceptance;[7] and notification thereof given to the drawer.[8] When the acceptance *supra* protest is by the drawee himself, he must by the first post advise the person, for whose honour he has accepted, of the quality of the acceptance, and send this protest and instrument of acceptance to him, that he may take the necessary measures against the drawer or prior indorsers.[9] When the acceptance is by a third party for the honour of the bill

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[5] Parf. Neg. tom. 2. ch. 9. § 5.—Beawes, n. 107. 108.—Mar. p. 87.—Scarlet, ch. 12.

[6] 1703, Carftairs *a.* Paton, Dict. v. 1. p. 99.

[7] Poth. n. 114.—Molloy, § 28.

[8] Scarlet, ch. 7. R. 16.—Forbes, p. 102.

[9] Beawes, n. 108.—Parf. Neg. ch. 9. Max. 3.—Scarlet, ch. 12. R. 4.

bill or of the drawer, it is incumbent on him to give a similar intimation to the drawer, that he may be enabled to adopt the proper steps against the drawee. The possessor of a bill cannot, it is said, refuse receiving acceptance *supra* protest from any responsible person, unless he have orders not to admit of such acceptance; in as much as a simple acceptance, and an acceptance *supra* protest are the same to him, since they alike bind the accepter to pay, without affecting the *porteur*'s recourse against the drawer and indorsers, if payment be not made when the bill falls due; and as the accepter is bound to pay all charges.[1] It is doubtful, however, whether the holder is obliged to acquiesce in such acceptance; and, in England, it has been decided that he is not.[2]

The accessory obligations upon the other parties, arising from the acceptance *supra* protest, will be treated of in the sequel.

[1] Beawes, n. 27.—Scac. § 2. gl. 5. n. 390.—Scarlet, ch. 12. R. 6.

[2] Chitty, 104.

CHAP. V.

OF INDORSATION.

THE utility of bills consists, in a great measure, in the ease and despatch with which they may be transferred from one person to another by indorsation, so called from its being generally written on the back of the bill. An indorsation is made, either by the indorser's writing and subscribing an order to pay the contents of the bill to some particular person mentioned by name, which is styled a full indorsement; or by merely signing his name on the bill, and delivering it to the indorsee, or person to whom it is indorsed, which is termed a blank indorsation; and both equally vest a right in the indorsee to demand payment of the bill from the accepter. Blank indorsations are more frequent than full ones, because, if every indorsement was

in full, the back of the bill would soon be filled up, and its negotiability thereby circumscribed; and there would be no room for receipts, for partial payments, &c. But as a blank indorsation gives a full right to demand payment of the contents, it would, perhaps, be prudent in the indorser to fill it up as soon as possible, in order to avoid the risk he may run in the event of the bill being lost, and getting into the hands of a *bona fide* holder.[1] Bills are generally transferred by indorsation, after acceptance, and before the period of payment; but they may also be indorsed before acceptance, or after they are due. It would appear, too, that bills may be indorsed away even after being protested,[2] though, certainly, no transference in this way can take place after registration of the protest;[3] and to allow protested bills to pass by indorsation, might,

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[1] Beawes, n. 178.—MacDowall's Inst. B. 1. T. 13. § 18. In France, not only blank indorsations are null, but all indorsations must be dated; and antedating is prohibited under the penalty of being prosecuted for fraud. Ord. of 1673. art. 23, 26.—The rigour of the law, with regard to blank indorsations, is now, however, somewhat relaxed. Boucher, Inst. Com. 1029.

[2] 1787. MacAdam *a.* MacWilliam, Fac. Col. No. 334. P. 514.

[3] Ersk. b. 3. t. 2. § 31.—There is a case collected by Edgar, p. 52, where a bill was indorsed for value, after registration of the protest, and the indorsee pursued the indorsers for recourse, which the Court refused, not upon this ground, but because the indorsee failed in due negociation. 1724. MacLeod *a* Gordon.—In the Dictionary, the date is erroneously stated to be 1764.

might, in many cases, lead to very improper and unjust transactions. A drawer, or indorser, cannot, in the character of indorsee, maintain an action against the accepter, where the indorsement is after the refusal of payment; because, when a bill is returned unpaid, either on the drawer or indorsers, its negotiability is at an end. [4] In an action, by the indorsee of a promissory note against the grantor, where the note appeared to have been noted for non-payment, and indorsed afterwards, the grantor was admitted to show that the note was paid, as between him and the payee, from whom the indorsee received it. [5]

The right to a bill is sufficiently transmitted by the indorsement, whether delivery has been made or not; and the indorsee may claim it though found among the effects of the indorser at the time of his death. [6] To make a bill indorsable, it is not necessary that it contain the words 'to order.' [7] An indorsement to pay to the order of a person, is the same in effect as an indorsement to pay to that person or order; and he may pursue on such indorsation in his own name; but no effectual indorsation can be made, except by

[4] Kyd, p. 194.

[5] Ibid. p. 284, 195.

[6] 1787, Carrick *a.* Kay, Dict. v. 4. p. 414.

[7] 1726, Crichton *a.* Gibson, *Ibid.* v. 1. p. 96.—Ersk. b. 3. t. 2. § 28.

the owner of the bill or his agent. An indorsation of a bill, by a person of the same name with the person entitled to transfer it, was found of no effect, (except against the person indorsing it, and subsequent indorsers), though he who had the right to indorse was not particularly described in the bill.[8]

When a bill is indorsed after the term of payment, it is payable on demand; and it is only necessary for the holder to present it for payment as a letter of credit; and, if payment be refused, to notify the refusal to the indorser within a reasonable time.[9]

Indorsations are presumed to be for value, whether value received be expressed or not, unless the contrary be proved by the writ or oath of party;[1] and hence, if the indorsee cannot make good this payment from the accepter, he has recourse not only against the drawer, but against the indorser for the recovery of that value; and if there be several indorsers, he may insist for relief against any one of them. An indorser, however, is freed from any claim of recourse if he subjoins to his indorsation the words *without recourse.*[2] Scoring the indorsation reinvests the indorser in the same

[8] Bayley's Sum. p. 36.

[9] 1749, Forbes *a.* Young, Kilker. No. 22. p. 87.

[1] 1715, Auchinleck *a.* Miller, Dict. v. 1. p. 99. and ch. 3. p. 88.

[2] Erik. b. 3. t. 2. § 28.

same rights that he possessed previous to passing the bill. An indorsee, after having protested a bill against the drawer and others concerned, for non-payment, returned it to the indorser with his indorsation scored, and he, again, indorsed it to other indorsees, who gave in the protest to be registered in their name for execution; it was found that the indorser was reinvested by the first indorsation having been scored, and the protest was allowed to be registered.[3]

Indorsations of bills of exchange are more privileged than bills themselves; date and place are ordinary requisites of bills, but indorsations and receipts on bills are sustained without being dated. When an indorsation is not dated, the legal presumption is, that it is of the date of the bill;[4] and if it be dated, it is to be held as of that date till the contrary be proved.[5] After indorsation, the bill carries a right to the sums contained in it, free from all burdens and exceptions but those that are marked on the bill itself.[6] No receipt or discharge, therefore, by the payee or original

[3] 1752, Fairholms, Kilker. No. 28. p. 91. Dict. v. 3. p. 77.

[4] 1709, Roffie *a.* Ogilvie, Forbes, Dec. p. 347.—1712, Smith *a.* Home, Dalrymple, No. 93. p. 130.

[5] 1794, Thiftle Bank *a.* Leny, Bell's Collection of Cafes for 1794.

[6] Smith *a.* Home, *ut fupra.*

creditor, written on a paper apart, can secure the accepter from paying a second time to the indorsee, though the indorsation should be posterior to the receipt or discharge.[7] And although a bill should have been granted without value, or though the accepter should have a good ground of compensation or set-off against the drawer had the bill continued in his hands,[8] it is of no avail against the indorsee, whose right cannot be affected otherwise than by what appears on the face of the bill itself. But if the accepter shall prove by the indorsee's oath, either that the bill was indorsed to him for the indorser's own behoof, or that he the indorsee paid no value for it, the indorsee is justly accounted as but a name; and the common rule, which holds in other obligations, applies, sustaining all exceptions against the indorsee that are pleadable against the cedent or original creditor.[9]

The oath of the indorsee, with regard to the value he gave, must be special. J. Swan having made a reference to the oath of S. Swan, with respect to the onerosity of an indorsation of a bill: the latter deponed, in general, 'that he paid value for the indorsation,

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[7] 1714, Fairholm *a.* Cockburn, Dict. v. 1. p. 98.—1778, Burnet *a.* Ritchie, Dict. v. 3. p. 82. Erſk.

[8] 1740, Nielſon *a.* Bruce.—1741, Clark *a.* Stewart, Dict. v. 3. p. 81.

[9] Erſk. b. 3. t. 2. § 3.

sation, and was an onerous indorsee.[1] But being requested to mention particularly what the value was, he refused to give any more special answer. During an action which depended on that point, between S. Swan and J. Swan, the former died; and afterwards, his heir having been made a party, the Lord Ordinary, sustained the oath as a sufficient proof of onerosity; but the Court altered that judgment, and found that S. Swan was not entitled to the privilege of an onerous indorsee.[2]

If the indorsation has been fraudulently devised between the drawer and indorsee, to preclude the acceptor's defence, a proof of the circumstance will be allowed; for though bills, when in the possesion of fair and onerous indorsees are, like bags of money, liable to no exceptions arising from the fraud of anterior holders; yet, a collusive transference ought not to be attended with the same privileges.[1] It is also sufficient to plead against an onerous indorsee, that the bill was originally obtained by violence, and the terror of imprisonment; for it is of no importance in what shape the document appears, if it be destitute of those qualities that are essential to every obligation; and no obligation extorted by force or fear, is, or

[1] 1780, Swan *a.* Swan. Fac. Col. No. 286. p. 441. See also Fulton *a.* Johnston, Dict. 1. 105.

[2] 1785, Corrie *a.* Callendar, &c. Dict. v. 3. p. 81.

or ought to be, binding on the grantor.[3] In the same manner, a bill originally granted for an unlawful consideration, is of no force against the grantor, to whomsoever it may be afterwards indorsed. A bill, for instance, given for a game debt above 5l., contains such a *vitium reale*, as to render it ineffectual, even in the hands of an onerous indorsee.[4] But if the bill be indorsed

[3] 1776, Willocks *a.* Callendar, Dict. 3. 81. 1787, Wightman *a.* Graham. Fac. Col. No. 9. p. 16.

[4] Mor. Dict. p. 1509.—No direct decision upon this point appears to have been collected. It is not, therefore, exactly known what were the principles upon which the Court proceeded. It may, however, be inferred, that the intention was to crush, as far as possible, gambling transactions, by annulling every document given for a gaming debt. But though the holder cannot recover from the original grantor of the bill or note, he may do so either from the other indorsers who have received value and passed the bill, without knowing any thing of the purpose or consideration for which it was at first given, or from the drawer who was privy to it. For as every indorsation of a bill, constitutes a new and separate contract between the indorser and indorsee, independent of that between the drawer and accepter, the bill, though void on the original transaction, and between the original parties, may be sufficiently binding as to subsequent ones. A *bona fide* indorsee, therefore, who has given value for the bill, ought, at all events, to have an action upon it against the indorser from whom he derived the right, and all preceding indorsers. The objection to a bill, that it was granted for an unlawful consideration, may be very good in the mouth of an accepter; but could not, with any propriety, be pleaded by the drawer who had indorsed away the bill for value. If this were allowed, the law rendering bills for game debts ineffectual, even in the hands of an onerous indorsee, might be productive of more mischief, than it intended to repress. It would, in fact, be opening a door for swindling and fraud, and would totally destroy the

indorsed away before acceptance, and is afterwards accepted in the hands of the indorsee, it ought to bind both the accepter, and the drawer indorser; for the former, by accepting the bill in the hands of a third party, homologates the right of that party to demand payment from him. [5] In the case of Perchard and Brock *a.* Breckenridge, &c. a bill for smuggled goods

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the confidence which is so necessary for the exercise and promotion of commerce.

In some of the English cases, however, it would appear, that a bill granted for an unlawful consideration is void *ab initio*. An action was brought by an innocent indorsee of a gaming note, who paid a valuable consideration, against the drawer, to whom the money was lent, and it was held he could not recover, Bowyer *v.* Brampton, 2 Str. 1155. And the law is thus stated by an English writer. If a bill of exchange or note is given in consequence of an usurious contract, it is absolutely void when in the hands of an innocent person, who may have taken it in the fair and regular course of business, without any notice of the usury; and evidence of usury will be a good defence in an action brought upon such bill or note against the drawer, accepter, or indorser. So, in case of gaming debts, the borrower may be a witness, though the money is not paid, if the usury neither affects the debt, nor avoids the contract; and where the matter is doubtful, the objection shall only go to his credit, and not to his competency as a witness. Manning, Law of Bills, p. 65. It is evident, however, that upon the common principles of justice, as well as of expediency, the holder of a bill ought in all cases to have an action against the indorser, to whom he has paid value.—Kyd. p. 283.—Ord on the Law of Usury, p. 133.—Chitty, 53.

[5] Ord on Usury, p. 133. If a bill is given for money won at play to the winner, or order, and the winner indorses it to a stranger for a just debt, and the person upon whom the bill was drawn accepts it in the hands of the stranger—the accepter would be liable, and the indorser would also be liable to such indorsee. Com. Rep. 6.

goods was held good in the hands of onerous and *bona fide* payees, in whose favour it had been originally drawn and accepted;[6] and from the principle of the decision, we may presume, that the bill would have been so in the possession of an onerous indorsee. This, however, is rather inimical to the doctrine which the decisions on analogous points have a tendency to establish, *viz.* that a bill granted for an unlawful consideration, is ineffectual against the grantor, even in the hands of an onerous indorsee. If the consideration for which a bill was originally given, was not illegal, and the bill is afterwards indorsed for an unlawful consideration, this cannot affect the right of the indorsee to insist against the accepter; however, it may operate against his claim on the indorser.[7]

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[6] 1791. Bell's Caſ. p. 121.—In this caſe it was found that the holders were bound to anſwer every queſtion relative to the oneroſity, and tending to ſhow the nature of the tranſaction.

[7] Parr v. Eleaſon 1. Raſt. Rep. 93.—A bill of exchange was indorſed over by the payee, for an uſurious conſideration; and the indorſees neglected the bill, which was afterwards paid to the aſſignees under the bankruptcy of the original indorſees (being ſubſequent to their indorſement) in ſatisfaction of a debt due to the bankrupts' eſtate. Lord Kenyon was of opinion, that the aſſignees had a right to protect their poſſeſſion of the bill, by the title of the party from whom they received it in payment; who was an innocent holder: and that the bill being valid in its inception, the ſtatute of uſury did not apply to that caſe; and when the caſe came again before the

It is no good defence against an indorsee, that the bill was elicited without value from the accepter, when intoxicated,[8] as drunkenness is but a temporary incapacity, created by the accepter's own fault; and to admit of such an excuse, would tend to encourage an improper vice, and afford a ground for quarrelling bills on the most captious pretences. Neither is it a sufficient reason for refusing to pay to an onerous indorsee, that an accepter who admits his subscription, and does not allege previous payment, pleads that the bill is prescribed, and that it had been accepted solely for the accommodation of the drawer; as the right of the indorsee cannot be affected by the cause of granting the bill, and the debt, (at least it was so found), being as much due as on the day the bill was accepted.[9]

A creditor to whom a bill was indorsed in security of a just debt, was found not to be affected by a back letter of the indorser to the accepter of the bill, more than if he had taken the bill in full payment. But in so far as a bill stands in the person of an indorsee as trustee for the indorser's other creditors, whose debts were

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Court, on a rule to shew cause, (although it was argued, that as the bankrupts could not have maintained an action against the first indorser, a title could not be derived through him to the assignees), the rule was discharged. Ord, 139.

[8] 1736, Wilson, &c. *a.* Nisbet, Dict. v. 1. p. 98.

[9] 1800, Philp *a.* Milne, Fac. Coll. N° 155. p. 349.

were contracted prior to the date of the bill and the trust, a back letter to the accepter will operate against these debts; because, such creditors cannot be said to be onerous indorsees, or to have lent their money on the faith of a bill which was not in existence, or assigned for their behoof, till after the debts were contracted. [2] A person who had granted an obligation for bills indorsed to him, was found, notwithstanding, to be an onerous indorsee, and not obliged to allow for, or admit, partial payments not marked on the bills themselves, unless in so far as he had agreed to do so. [3]

A bill may be indorsed, though the holder has written on the back of it, that he had drawn a separate bill for the amount, if that bill be dishonoured; [3] and an obligation contained in a bill, distinct from the bill itself, if it be not of such a nature as to vitiate the bill, is transferable by indorsation. [4] But as indorsation is a relative writ which must stand or fall with the bill, any clause in the principal which renders it void, must of necessity annihilate the accessory obligation. Thus, a bill with annualrent and penalties

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[2] 1757, Douglas *a.* Elliot, Fac. Coll. N° 8. p. 13.

[3] 1778, Burnet *a.* Ritchie, Dict. v. 3. p. 82.

[3] 1714, Mitchell *a.* Brown, Mor. Dict. p. 1469.

[4] 1727, Grierson *a.* Earl of Sutherland, Dict. v. 1, p. 97.

penalties being found null, an indorsation of it, though bearing for value received, was ineffectual. [5]

To constitute an indorsation, no particular set of words is necessary, either to convey the sum in the bill completely to the indorsee, or merely to appoint him agent to receive payment in behalf of the indorser. In both cases, it is sufficient that the indorser's name be written on the back of the bill by himself, or by some other person duly authorized by him. But an indorsation may be restricted, as where it is made 'pay to such a person for my use,' which prevents a blank indorsation from being filled up by the indorsee, so as to convey any interest in the bill to himself, and from transferring it to another, so as to give him a right of action either against the person imposing the restriction, or any of the preceding parties. By an indorsation of this sort, the indorsee acts merely as agent or procurator for the indorser, and, according to some writers, payment to him may be countermanded by the proprietor of the bill; [6] but according to others, and apparently with more reason, it cannot. [7] In England, it has been ascertained, that any indorser may restrain the negotiability of a bill, by using express

[5] 1730, Thoirs *a.* Frafer, *ibid.* p. 96.

[6] Molloy, b. 2. ch. 10. § 22.—Mar. 72.—Scarlet, ch. 16. R. 6.—Scac. § 2. gl. 5. n. 450.

[7] Beawes, n. 219.—See alfo Poth. n. 165, 188.

press words to that effect, as by indorsing it 'pay-'able to J. S. only,' or 'the within must be credit-'ed to J. S.;' or by any other words clearly indicating his intention to make a restrictive or limited indorsement.[8]

After a bill has been paid, no indorsation can take place so as to affect the accepter or any of the parties who would otherwise be discharged; nor can an indorsation be made after acceptance, for less than the full sum in the bill; for, were it otherwise, the accepter or drawer would be liable, upon one entire obligation, to as many actions or diligences as the payee or indorsee might think fit to split the sum into by partial indorsations.[9] But where, before acceptance, a bill is indorsed for part of the sum for which it is drawn, the accepter may, by his acceptance after this indorsation, subject himself to pay according as the bill stood at the time of the acceptance; and where part of the bill has been paid, it may be indorsed for the remainder.[1] When a foreign bill drawn in sets is indorsed, each part must be delivered to the indorsee, otherwise the same inconveniences may follow, which, as before stated, may arise from neglecting to deliver each of them to the payee.

In

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[8] Chitty, p. 120.—Kyd, p. 100.—Bayley, 55.

[9] Kyd, 109.

[1] Chitty, 120, 121.

In the event of a bill blank indorsed being lost, the person entitled to it should immediately give notice thereof to the acceptet and all the antecedent parties;[2] and if it be a note transferable by mere delivery, public notice of the loss ought to be given. The drawer of the bill is, in this case, obliged to grant a new bill to the payee, upon his finding sufficient security that no loss or damage shall accrue to the drawer on account of the first.[3] An onerous indorsee, however, is entitled to payment of a bill from the drawer, although it has been lost by, or stolen from, the holder.

Marshall, for Carrick Brown & Co., bankers in Glasgow, drew a bill bearing to be his 'first of exchange,' on Moffat Kensington & Co., their correspondent in London, payable to Millar & Co., or order. It was indorsed by Millar & Co., and, after passing through several other hands, came into possession of Weatherall & Geering of London, whose clerk had his pocket-book containing the bill stolen from him, as he was carrying it for acceptance. The theft was notified in the Daily Advertiser; but the bill not being recovered, Marshall granted a second, 'his first 'of the same date and tenor not being paid,' on re-

[2] Beawes, n. 179.—Poth. n. 132.

[3] Poth. n. 130, 131.—Mar. 80.—Sav. tom. 2. liv. 3. ch. 5.—Beawes, n. 177.

ceiving an obligation from Weatherall & Geering, to indemnify his company against the appearance of the first. The first bill, with seven blank indorsations on it, was presented the day before it fell due, to Lambton & Co., bankers in Newcastle, by the last indorser, with whom they were totally unacquainted. They discounted and remitted it to their correspondent in London, who presented it to Moffat & Co. for payment, on the day it fell due. This was refused, as the second bill had been previously paid. The bill was therefore protested by Lambton & Co., and a charge given to Marshall for payment.

In a suspension, appearance was made for Weatherall & Geering, who, with Marshall, pleaded, that Marshall, in granting the second bill, acted according to established practice; and as the loss must fall either on Weatherall & Geering, or Lambton & Co., it ought to be borne by the latter, who, in discounting the bill to an utter stranger not recommended to them, transgressed a rule of bankers which is very salutary in preventing persons acquiring bills *mala fide* from obtaining payment; and particularly after the advertisement in the newspaper, the discounters could not be considered as without blame in the transaction.

The Lord Ordinary, in respect the discounters paid *bona fide* full value for the indorsation to the bill, and that it was not offered to be shown they were in the knowledge of the bill having been stolen or lost,

found

found the grantor liable to pay it, reserving to him relief against the indorsees, by whose clerk it was lost. To which judgment the Court adhered, on the general ground, that there is no *rei vindicatio* against onerous holders of bills or bank notes.[4]

Another case, regarding a lost bill, was decided in England in 1801. A bill, of the following tenor, 'March 30th, 1801.—Fifty days after date, pay to 'the order of Mr Thomas Stokes, five hundred 'pounds, value received. William Vasey.' was accepted by the Southwark Banking Company, and was indorsed by the payee to William Speirs, who had the bill stolen from him with his name on the back of it. It then passed into the hands of a person who described himself as J. Warren, who got the bill discounted by the Richmond Bank. The discounters brought an action for payment of the bill against the

 acceptors,

4 1799, Lambton & Co. *a.* Marshall, Fac. Coll. No. 132. p. 302. This decision appears to be in some degree incompatible with the security and confidence of merchants, who, in their foreign bills, generally draw three of the same tenor and date, only one of which is payable, while the others are unpaid. Were a needy payee to indorse away the whole set for value, or, what amounts to the same thing, were two of the bills to be lost, and afterwards to come into the hands of onerous and *bona fide* holders, according to the principle of the decision the drawer would be liable for the whole. This, upon some occasions, might be productive of very mischievous consequences in the mercantile world, and would, in fact, render nugatory the condition expressed in each bill, that it is only payable the others remaining unpaid, which is introduced for the express purpose of guarding against such casualties.

accepters, who were nominal defendants, as they were to be indemnified by the party who had lost the bill. The case of Grant & Vaughan, which was decided in 1764, was rested on as authority by the plaintiffs. In that case, Lord Mansfield said, if one of the two persons had been guilty of negligence, and the question was, which of them should bear the loss, the answer was clear; he who had been guilty of negligence. Mr Spiers, the holder of the bill, ought not to have indorsed it, till he had been going to pay it away. If he had kept it unindorsed in his possession, it would have been perfectly safe.[1]

A fictitious indorsement to a bill is forgery. Such indorsation is clearly giving it a false credit; and, on that principle, it is made with intent to defraud: for persons who receive bills consider every name on them as an additional security or pledge to indemnify them from loss: but if the *real* indorser fails, recourse cannot be had upon a *fictitious* or *imaginary* one. To make use, therefore, of a fictitious name as a pretended indorser of a bill, is forgery, with intent to defraud.[2]

Where

[1] Lawson, &c. *v.* Weston, &c. Manning, p. 70.

[2] Manning, p. 33, and cases quoted. As to improbation of bills on alleged forgery, see 1743, Robertson *a.* Allisons, Dict. 3. p. 313; and 1747, A. *a.* B. Falconer, v. 1. N° 187. p. 252. See also, as to the uttering of forged notes, 1782, King's Advocate *a.* Macafee, Fac. Coll. Appendix, N° 1. p. 1.

Where a bill or note is payable to two persons, *or* either of them, an indorsation by one is effectual, though they be not in partnership. [3]

It has been seen, [4] that a bill left blank in the drawer's name, in the repositories of a deceased person, may be filled up by his representative as drawer; and, on a similar principle, it may be presumed, that if a bill or note be granted to a woman, while single, and she afterwards marry, the right to transfer it by indorsation would vest in the husband, as, by the marriage, he is entitled to all her moveable property; and no married woman can grant, or come under, personal obligations.

[3] Kyd, p. 108.

[4] Ch. 2. p. 63.

CHAP. VI.

OF PAYMENT.

As the drawer and indorsers of a bill are only liable, in the event of the accepter's failing to pay, they are materially interested that the utmost strictness and punctuality be observed, on the part of the holder, in applying for, and procuring payment from him. It is therefore incumbent on the holder to present the bill for payment immediately when it falls due; and any omission or neglect on his part, will preclude him from seeking recourse on the other parties. Where a place of payment has been specified in the bill, it ought to be presented at that place; and if no place is mentioned, payment should be demanded from the accepter personally, or at his countinghouse, during the usual hours of business; or, if he be not in business, at his dwellinghouse. If it appears that the accepter is dead, the holder ought to inquire after his

personal representative, and present the bill to him;[5] and, if there be no representative, demand payment at the last residence of the deceased.[6] If the accepter of a foreign bill has merely removed from the place where the bill described him to be, the holder should use reasonable endeavours to find out whither he had removed, and present the bill for payment there. But if he has left the country, it is sufficient to demand payment at the place where he last resided.[7] Payment of bills due by a Company ought to be demanded at their office or countinghouse, within the usual office hours.[8]

Upon inland bills and notes, the three days of grace are usually allowed; and they should therefore be presented for payment on the last day of grace, within reasonable hours;[9] but foreign bills ought strictly to be presented on that day before the post goes off, that the protest and notification, in case of non-payment, may be transmitted without delay.[1] It does not seem to be exactly ascertained[2] within what time

[5] Molloy, b. 2. c. 10. § 34.

[6] Poth. n. 146.—Mar. 134.

[7] Chitty, p. 136.

[8] Forbes, p. 147.

[9] Manning, p. 37.—Kyd, p. 121.—Poth. n. 140.

[1] Chitty, p. 153.

[2] Savary, tom. 2. par. 17.—Poth. 141, 143.

time bills payable on demand, or at sight, ought to be presented for payment; and, indeed, it must depend so much on the situation of the parties, and other circumstances, that it is difficult, if not impossible, to establish any other than a general rule, that there shall be no undue delay, as it is to be presumed that the grantor of a bill of this description does not intend to give credit to the payee beyond the time necessary for presenting it. Among the merchants of London, checks or drafts on bankers given in that city, in the course of business, and payable there on demand, must be presented for payment on the day they are received, within the usual office hours; or, if there be not sufficient time that day, they must be presented next morning as soon as possible. [3]

A bill may be paid, either to the holder, or to any one authorised by him, or to his executors and representatives, or tutors and curators, or to a factor having a special or general factory, whose discharge will be sufficient. Payment, however, ought not to be made to the executors or representatives, until they have made up proper titles, or to any other person, till they have shown a proper power to receive and discharge it. [4] Payment to a minor will be valid, if the bill be beneficial to him, and the sum profitably applied

[3] Manning, p. 38.—Chitty 146.

[4] Poth. n. 164, 166.

applied to his use;[5] but payment to a married woman will not liberate the person paying, if he was in the knowledge of that circumstance. He is *in bona fide*, however, to pay to her even after marriage, until it be intimated to him.[6] When a wife is entrusted with the management of her husband's affairs *præposita negotiis hujusmodi*, and in use to receive money for her husband on her own receipt, payment may safely be made to her.[7] According to Pothier, payment of a bill to a person who is not the real owner of it, or empowered by him to receive its contents, will not liberate the accepter from paying a second time to the drawer or payee, if the first payment has not been occasioned by any fault on their part. He instances the case of a payee sending a bill by post to his correspondent in the place where it is payable, with an indorsation to him, and instructions to receive payment in his behalf. The post is robbed on the way; and one of the robbers personating the indorsee, presents the bill, and receives payment from the accepter before notice of the accident could be sent to him. Following the authority of Scaccia, Pothier decides, that the accepter is not discharged by this payment, seeing that it was made to a person not authorised to receive

[5] Erſk. b. 1. t. 7. § 33.—Poth. n. 166.

[6] Erſk. b. 3. t. 5. § 7.—Poth. n. 167.

[7] Forbes, p. 15.—Erſk. b. 1. t. 6. § 26.—Poth. n. 167.

receive it, without any blame being imputable to the true proprietor; and that the accepter ought not to have paid the bill to one whom he did not know, without a reference, which might have enabled him to ascertain that he who presented it was the identical person to whom it was indorsed, and entitled to apply for payment. [8]

It is doubtful how far the above doctrine would be admitted in this country, where bills are exposed to no latent exceptions, or claims of revindication. We have already seen, [9] that the accepter of a bill that has been falsified, is liable for any augmentation of the sum which his own negligence or oversight may have led to, or been the occasion of; and that the onerous indorsee of a bill which had been lost, was entitled to recover payment from the drawer, though a second bill drawn by him, of the same tenor and date, had been already paid, upon the general ground that there is no *rei vindicatio* in bills or bank notes. [1] The principle of this decision seems to establish, that *bona fide* payment by an accepter to the holder of a bill, must in all cases liberate the accepter. [2] The arguments,

[8] Poth. Part. 1. ch. 6. n. 168, 169.

[9] Ch. 3. p. 102.

[1] Ch. 5. p. 147.

[2] Good v. Col. 4. Durnf. & Eaft. Rep. 825.

ments, however, stated by Pothier on the point he has instanced, are certainly strong, and are founded upon principles deduced from a code of laws which professes to make general equity its basis. But betwixt the case illustrated by him, and that where a bill has been lost or stolen, there is evidently a material difference; for, in the latter, a degree of negligence or blame may always be attributable to the holder, which will and ought to operate in favour of the payer.[3]

When

[3] A perſon, ſays Boucher, called upon a banker with twenty or thirty thouſand francs, which he paid in to him, and received bills of exchange on a particular place for the amount, and requested the banker to give immediate advice to his correſpondent there, on whom the bills were drawn. It was poſt-day when the drafts were delivered, and the banker accordingly adviſed his correſpondent that day. The holder of the drafts, who was a dexterous ſharper, inſtantly carried them to his lodgings, and copied them ſo exactly, that, on returning to the bank, and pretending, to the banker, that certain circumſtances had occurred, which obliged him to change his intended projects, and requesting that he would take back the bills and redeliver his money, the banker, without teſtifying any diſtruſt, took the copies for the originals, and reſtored the money he had received. On this, the ſharper immediatey ſet off by poſt, and had the bills preſented and paid before the counter order of the drawer arrived. Was this payment on the part of the drawer good? Having really paid to him to whom his mandate directed him to pay, he did nothing more than execute the order with which he was charged, and, of courſe, he ought not to ſuſtain the loſs. Had the ſharper, in place of preſenting the true, preſented the forged bills, and the drawee paid them, would this have been deemed a valid payment, ſo as to have diſcharged him? This queſtion is not without difficulty. Boucher is inclined to think, that

When a note payable to the bearer, or a bill blank indorsed, is lost, the person liable is not obliged to make payment to him to whom it was granted, unless the authority of a judge be interposed, and security given by the receiver to relieve the payer from all loss. [4]

Payment of a forged bill will not affect the parties whose names have been forged. [5] But in England, it has been decided, that even a proof of the forgery of the drawer's handwriting, is no defence for the accepter or indorser, in an action at the suit of a *bonæ fidei* holder, if the defendant accepted or indorsed the bill, after the drawer's name was subscribed. If, however, the acceptance or indorsement was made without

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that the loss should in that case fall on the drawee, as being wanting in vigilance or intelligence in paying counterfeit bills, and ought therefore to suffer for his unskilfulness. This opinion does not appear to be altogether correct. The drawee was certainly led to pay, not only by the bills being presented, but by a genuine letter of advice from the drawer, informing him that bills of such a description had been drawn upon him. This was enough to throw him off his guard, and to divest him of any suspicion of the bills being forged, especially as the forgery was so artfully done, as to have at first deceived the drawer himself. It was the imprudence of the drawer in writing the letter of advice, and afterwards restoring the money, before he had time to countermand his letter, that was one principal cause of the loss; which ought properly therefore to be borne by him, and not by the correspondent whom he had contributed to deceive.

[4] Bouchen, p. 224. Forbes, 156.

[5] Poth. n. 103.—Beawes, n. 184.—Forbes, 154. See 1748, Christies *a.* Fairholms, Kilker. (Fraud) n. 3. p. 216.

without sight of the bill, it is incumbent on the plaintiff to prove the drawer's handwriting, as evidence of the instrument having been made.[6]

If, for the purpose of receiving payment, a person indorses a bill with a *fictitious* name, it is forgery, even though the indorsement be not absolutely necessary for obtaining payment.[7]

When a bill is payable to two or more jointly, each of them has a right to a proportional part only; but if it be payable to them conjunctly and severally, that is, to them or either of them, any one has a power to receive payment of the whole, and to discharge the

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[6] Chitty, p. 206.—Kyd, 204.

[7] Manning, p. 33. One Edward Tuft having got hold of a bill, the property of Weitherall, out of whose pocket it had been picked or loft, bought a horfe, and, in payment of the price, offered this bill to change. The feller not having fufficient cafh, carried it to a banker, one of whofe clerks told him it was very good paper, and that, if he would put his name on the back of it, he would difcount it. This, however, the feller declined; but told the clerk, that the gentleman from whom he had received it was at hand, and would indorfe it; and that he would go and fetch him. He accordingly returned with Tuft; and the clerk having told him that it was the rule of their fhop never to take a difcount bill, unlefs the perfon offering it made an indorfement; and therefore, if he would indorfe the bill, it fhould be difcounted. Tuft, on this, indorfed it by the name of *John Williams*, and the banker's clerk gave him the cafh for it. The judges were unanimoufly of opinion that this was forgery.

A banking company is not obliged to pay value for forgeries committed againft them; and they are entitled, when a forged note is prefented, to ftop its further progrefs, by putting a mark upon it, certifying that it is forged: 1768, Borland *v.* Thiftle Bank; Dict. 3. 47.

the bill, unless the accepter be interpelled by some of the others. [8]

As the conditions of time and place are of importance to all the parties of a bill, [9] no bill ought to be paid before it is due; and if payment be made before that time to a person who becomes afterwards insolvent, the accepter may, in some cases, be obliged to pay it again. [1] And as the holder cannot demand payment before the bill is due, neither can the accepter compel him to receive payment till then. [2] Where there is a place of payment mentioned in the bill, the holder is not obliged to accept of his money anywhere else; [3] and if the place of payment be alternative, it is in the option of the accepter where to pay. [4] If the holder refuse to receive payment when the bill falls due, the accepter ought to offer the money under form of instrument, and consign it in some responsible public office, which will free him from interest and damages; [5] and it is said that, after such offer, whether

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[8] Forbes, p. 155.—See ch. 2. p. 64.

[9] Poth. n. 173.

[1] Molloy, b. 2. c. 10. § 32.—Malyne, obs. 10.—Chitty p. 151.

[2] Boucher, n. 1165.

[3] Poth. 173. 187.

[4] Forbes, p. 144.

[5] Ibid. p. 147.—Poth. n. 173.—Dupuis, ch. 12. n. 10.

whether the money be consigned or not, he will be relieved of interest.[6] In such cases, however, consignation is always adviseable.[7] The holder is not obliged to receive payment, either from the accepter, or any third party, after the last day of grace, if the bill has been sent away with notice of the dishonour, or if he have redrawn for the value.[8]

The effect of payment is to extinguish the bill if the whole be paid, or to diminish its amount in the case of partial payment. Partial payments, indefinitely made by the accepter of several bills that are due, ought to be applied by the holder in extinction of the interest in the first instance, if any interest be due, and next in extinction or diminution of that sum which would be soonest lost by prescription without the aid of such application.[9] A partial payment of a bill of exchange may be taken, if the bill be protested for the remainder, and the other parties advised of it, because by such payment the debt is so far diminished.[1] But in England, if the holder take less than the whole sum without the consent of the other parties, it

[6] Forbes, p. 148. 1703, Boick *a.* Blackwood.

[7] Erſk. b. 3. t. 3. § 5.

[8] Scarlet, c. 19. R. 10.

[9] Erſk. b. 3. t. 3. § 2.

[1] Mar. p. 68. 86.—Scarlet, ch. 17.—Boucher.

it is said they will be liberated from their obligation, although the holder has given due notice of the partial dishonour; on the ground that the holder has thereby made an election to look for his money from the accepter.[2] This seems unreasonable; and, indeed, is contrary to the opinion expressed by the House of Lords, in the appealed case, Hodgson & Donaldson *a.* Bushby, 1782, where a receipt by the holder for a partial payment from the accepter, after a protest for non-payment, was found not to liberate the drawer and indorsers, and was treated as a circumstance entirely immaterial.[3] But if the holder of a bill for value, compounds with an accepter without the consent of the other parties, he forfeits his right of recourse against them, upon very just principles; for, taking a sum in part-payment, is a very different thing from accepting of a certain sum of money in complete satisfaction of the debt, which would deprive all the other parties of the right of resorting to him afterwards. In the same manner, the receiving of a bond, or any other security in satisfaction of a bill, ought to operate as a discharge to the other parties, if they have not consented to the measure.[4] But if the bill has been duly negotiated,

[2] Chitty.—Lord Raymond's Rep. v. 1. p. 743.

[3] Fac. Col. No. 56. p. 88. and No. 73. p. 112.—12th May, 1783, Journals of the Houſe of Lords.

[4] Chitty, p. 155.

tiated, an assignation to an infeftment, taken by the holder in security, will not bar his action of recourse once established by the due negotiation.[5]

When a foreign bill is drawn payable in a foreign country in foreign coin, the value of which is depreciated by the government of that country, the bill is payable according to the value of the money at the time it was drawn.[6] When payment is made by a draft on a banker, if the person receiving the draft does not use due diligence to get it paid, the person from whom he received it will be discharged, but not otherwise, unless the holder expressly agreed to run all risks; and in England it has been decided, that the act of writing a receipt in full will not be evidence of such an agreement.[7] The safest plan undoubtedly is, not to part with the bill till the draft be paid.[8] A bill or note was granted for the price of rigging a ship. The grantor afterwards drew a draft for the amount, payable to the debtor to whom he had granted the bill. The debtor finding little chance of getting

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[5] 1711, Nicolson *a.* Morison, Dict. v. 1. p. 101.

[6] Chitty, p. 154.

[7] *Ibid.* It was, however, since decided, that a banker having a bill remitted to him to present for payment, was justified in giving it up, on receiving a check for the amount on another banker, although the check was dishonoured. 6. T. R. 12. Manning, p. 92. Chitty, *ibid.*

[8] Mar. p. 21.

ting payment of the draft, pursued his creditor in the original bill or note, and an action was sustained on it.[9] A draft given by an accepter on another person in payment of a bill which was delivered up to him, does not prevent recourse upon him as drawer of the draft, if it be duly negotiated and not paid.[1]

On payment, the bill is generally delivered up; but it is not well ascertained whether the person paying can insist for a separate receipt or not. It appears but just, however, that a receipt on the bill, which needs no stamp,[2] should be given if demanded. When the bill is paid by an indorser, it is necessary that he have a receipt to enable him to operate against the accepter and previous indorsers; which receipt is usually taken on the protest, and entitles him to registrate the protest, and to proceed with diligence in his own name.[3] A bill having upon it a receipt for payment in general, is presumed to have been paid by the accepter.

Young accepted a bill drawn by R. Steel & Co., payable one hundred days after date, which the drawers afterwards discounted with the Falkirk Banking

[9] Oswald *a.* Gordon, Forbes, Dec. 511.

[1] 1715, Johnston *a.* Murray, Bruce, No. 48. p. 61.

[2] 23d Geo. III. c. 49. § 4, 7. 44th Geo. III. c. 98. § 2, 8.

[3] 12th Geo. III. c. 72, § 43.

Company. When it became due, it was retired by T. Steel, one of the partners of Steel & Co., who took a receipt from the cashier of the Bank in these terms, 'Received payment of the within.' T. Steel died soon after; and the retired bill having been found in his repositories, it was assigned by R. Steel, his partner, to Ferguson, in security of a Company debt. Ferguson raised an action for payment against Young the accepter, who pleaded, that he had put into the hands of T. Steel the money with which he had retired the bill; and, in support of this allegation, he founded on the nature of the receipt granted by the Bank, contending, that wherever a bill appears with a receipt on the back of it in general terms, not mentioning by whom it was paid, the presumption of law is, that it had been retired by the accepter, the proper debtor, or at least with his money. The Court sustained the defence.[4]

But, as has been already mentioned, separate receipts for partial payments of a bill will not militate against a person to whom the bill is afterwards indorsed.[5]

Payment, when made by the accepter, extinguishes his

[4] 1793, Ferguſſon *a.* Young, Fac. Coll. No. 80. p. 175.—Chitty, 209.

[5] 1714, Fairholm *a.* Cockburn.

his obligation to the drawer, and the drawer's obligation to the payee. If the accepter was indebted to the drawer, the payment affords him a good ground of compensation, or set-off, against that debt; if he was not, he has an action against the drawer *ex mandato*[6] for repayment of the sum advanced by him on the drawer's account, besides a reward for his trouble, which is called commission-money.[7] One of the accepters of a bill having paid the amount, was found entitled to repayment from the drawer, though the latter alleged that he never meant to draw upon him, his name having been got added to the bill by the other accepter without his knowledge.[8] With regard to all the other parties, the accepter is considered as the original debtor, and the holder is in all cases entitled to insist against him in the first instance. Where the bill does not expressly bear value in the hands of the drawee, a presumption seems to be received by our practice that he is not the drawer's debtor, and consequently an action of recourse is competent to him against the drawer for repayment;[9] where it does

[6] Stair, b. 1. t. 11. § 7.—Poth. n. 161. 97.

[7] Ersk. b. 3. t. 2. § 30.—Poth. n. 86, 87.

[8] 1712, Wilson *a.* MacKenzie, D. Forbes, p. 512.

[9] 1711, Cunningham *a.* Agnew, Dict. v. 1. p. 99.—Wilson *a.* MacKenzie, *ibid.*

bear value in his hands, the presumption thence arising can only be removed by the writ or oath of the drawer.[1] Where a bill is accepted and paid for or upon account of a third person, no action of recourse lies against the drawer at the instance of him who made the payment; as, by accepting the bill, he followed the faith and credit, not of the drawer, but of the person for or upon whose account it was drawn.[2] Few persons drawn upon, who are not in the possession of the drawer's funds, venture to accept and pay a bill till they have suffered it to be protested against themselves for non-acceptance, after which they may safely accept and pay *supra* protest for the honour of the drawer; which preserves their right of recourse free from challenge.

Payment *supra* protest, may be made not only by the persons mentioned in the bill, but by any other person, in honour of the drawer or the indorsers. He who pays a bill of exchange *supra* protest, acts for the benefit of all concerned, and therefore, has not only an action against the person for whose honour he paid, but is entitled, *jure singulari*, to an action against all

[1] 1793, Wallace *a.* Barrie, Fac. Coll. No. 79. p. 174. —Chitty, p. 205.—See also Arthur *a.* Oldcorn, 1717, Bruce, No. 51. p. 69.

[2] Poth. n. 105.—Beawes, n. 124.

all the other parties who are liable to that person.[3] After a bill has been accepted simply, the accepter cannot pay in honour of an indorser, because he is already bound to him; but if he has accepted without having effects of the drawer in his hands, he may suffer the bill to be protested, and then pay *supra* protest,[4] so as to secure his recourse against the drawer. No person should pay in honour of another, before the bill has been protested for non-payment; in which protest, or in a separate instrument, must be expressed for whose honour he has paid, and the nature and quality of the payment; otherwise recourse will be lost against him for whom payment was made.[5] If, however, an accepter *supra* protest, for the honour of the drawer or indorser, receives his approbation of the acceptance, he may freely pay the bill without a protest for non-payment.[6] He who pays a bill *supra* protest, is bound to give the same timely notification of the dishonour to the other parties, as the holder is in other cases;[7] for, were not the same

[3] Sav. tom. 2. ch. 9. § 10.—Poth. n. 171.—Beawes, n. 48. 54.—Mar. 128.

[4] Beawes, n. 51.—Chitty, 163.—Sav. tom. 2. ch. 9. § 11.—Poth. n. 114.

[5] Beawes, n. 53.—Mar. 128.—1703, Carstairs *a.* Paton, Dalrymple, N° 40. p. 51.—Poth. n. 114. *contra.*

[6] Beawes, n. 48.—Chitty, 164.

[7] 1743, Ochterlony *a.* Hunter, Dict. v. 3. p. 89.

strictness of negotiation observed, the person for whose honour he paid would be in a worse situation than if he had not at all interfered.[8] If, as already observed, payment be made for the honour of the drawer, the person paying has relief against him, but not against the indorsers; if for the honour of an indorser, he has relief not only against that indorser, but against all the previous indorsers, but not against subsequent ones.[9]

When payment of a bill is made, the document is usually delivered up to the debtor, or to the person by whom it has been paid; and as long as it remains in the creditor's custody, it is presumed unpaid. A bill with a receipt of the contents written and subscribed by the creditor, and found among his papers after his death, will not exoner the debtor; because, in law, the receipt is presumed to have been written with the expectation of payment, *spe numerandæ pecuniæ*; and, not being delivered, the presumption is that it was not paid.[1] Payment, however, may, in certain

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[8] Poth. n. 114.—Sav. tom. 2. ch. 9.—Max. 3.

[9] Beawes, n. 57.—Sav. *ibid.*—Kyd, p. 155.

[1] 1709, Cochrane *a.* Pringle, Dict. v. 2. p. 269.—If the bill is prescribed, the existence of the debt can only be proved, in the usual manner, by the writ or oath of the debtor.

tain cases, be presumed from circumstances, though the bill be unretired.

Fraser granted a promissory note to Boog, who lived five years and ten months after its date in 1780, without having made any claim upon it. Action, however, was raised by Russell and other trustees of the heir of Boog. The defender stated a variety of circumstances, from which it appeared that the debt was already paid; and the Court found, there was sufficient presumptive evidence that the note had been paid or accounted for by the defender to Boog. [2]

Prior to the introduction of the statute of limitation, payment of an old bill bearing to be for rent of land, was presumed, from three consecutive discharges of rent in a posterior tack having been granted, the last of which discharged all precedings. [3] When a bill accepted by two persons is retired with a blank indorsation, and is afterwards found in the custody of one of them, the presumption is, that both have contributed equally to the payment. [4]

It may be here proper to observe, that when payment of a debt not truly due, is made by a person, either through mistake or ignorance, he is entitled to an action

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[2] 1788, Ruffel, &c. *a.* Fraſer, Fac. Colk No. 21. p. 36.

[3] 1744, Kames *a.* Anderſon, Dict. v. 4. p. 120.

[4] 1728, Campbell *a.* Cockburn, Dict. v. 2. p. 152.

action against the receiver for repayment. And as the right to this action is founded on equity, redress is competent, whether the payment arose from a mistake in point of fact, or in the law with regard to it.[5] Thus, a cautioner in a bond having paid the debt, and next day discovered that he had become free by the lapse of the seven years to which cautionary obligations are limited by the act 1695, c. 5.; he was found entitled to repetition (repayment) from the creditor;[6] and in a judicial ranking and sale, a creditor who had obtained a total preference, was found liable to repetition, upon its being afterwards discovered that, as to a certain part of the debtor's lands, his security was null.[7] Upon the same principle, if a person under a misapprehension of facts, or of the law arising out of them, has paid a bill which he was under no obligation to pay; as, for instance, where the party to whom he paid had been guilty of neglect in negotiation, which, had the bill not been paid, might have been a good ground of refusing payment, he will be entitled to recover the sum so paid upon an action of *condictio indebiti*.[8]

[5] Erſk. b. 3. t. 3. § 54.

[6] 1778, Carrick *a.* Carſe, Fac. Coll. No. 41. p. 70.

[7] 1792, Keith *a.* Grant, &c. *Ibid.* No. 1. p. 1.

[8] 1792, Batchin *a.* Orr, Dict. v. 3. p. 87.

CHAP. VII.

OF PROTESTS.

When a bill of exchange is presented for acceptance, or payment, and refused, it ought immediately to be put into the hands of a notary-public and protested, and intimation of the dishonour given to the drawer and indorsers, which secures the holder's right of recourse against them.[1] The protest is a formal step of diligence which cannot be dispensed with, or the want of it supplied by witnesses or oath of party, or any other act.[1] It ascertains that no improper delay took place in negotiating the bill; that it was duly pre-

[1] Stair, b. 1. tit. 11. § 7.—Sav. tom. 1. liv. 3. ch. 6. —Edit de Commerce, tit. 5. art. 10.

presented by the holder; that acceptance, or payment, was refused; and that the holder reserves his right of operating relief against the other parties concerned. Protesting is not necessary to entitle the creditor to an action upon an accepted bill against the accepter, as the accepter has nothing to do with the negotiation of a bill, and action is always competent against him, whether it be protested or not;[2] but without that formality, the holder cannot have the benefit of summary diligence.

Protests vary in their form in different countries, but they should always be conformable to the custom of the country where they are made, and executed according to the laws and usages there practised.[3] In this country, a protest, in order to its being received in evidence, must be written on paper stamped with a proper stamp, the amount of which at present is three shillings, by the 44. Geo. III. c. 98. § 8.[4]

In every protest, the bill, and all the indorsements, if there be any, must be transcribed *verbatim*, and prefixed to the instrument, and the reasons specified why the bill was dishonoured or protested.[5] All bills

[2] Molloy, b. 2. c. 10. § 17. 31.

[3] Poth. n. 155.—Boucher, n. 1463.

[4] For the forms of Protests, and of the Acceptance *supra* proteſt, ſee Appendix No. 3.

[5] Act 1681.—Ord. de Com. tit. 5. art. 9.

bills ought to be protested for non-payment on the last day of grace, if they are not duly paid. A bill cannot be protested against the accepter on the day of payment;[6] but the protest must be taken within the three days of grace;[7] and where a bill was protested on the day after the last day of grace, recourse was refused, though no damage could be said to have arisen by delaying the protest.[8] When the last day of grace happens to be Sunday, the bill must be protested on the day preceding; and a bill protested on the day following was found not duly negotiated.[9]

When a bill of exchange is, by contrary winds, or any other accident, detained so long on the way, that the time of payment is expired, the holder ought, immediately on its arrival, to demand payment from the drawer, and, in the case of refusal, protest it for non-acceptance.[1] It appears, too, that a bill payable at a day certain, need not be protested till the last day of grace, when a protest for non-payment may at once be taken, without any previous protest for non-acceptance;

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[6] 1788, Charles *a.* Skirving, &c. Dict. v. 3. p. 84.

[7] 1751, Cruickshanks *a.* Mitchell, *ibid.* p. 83.

[8] 1758, Tod *a.* Maxwell, Fac. Coll. No. 123. p. 228. —1731, MacKenzie *a.* Urquhart, Dict. v. 1. p. 100.

[9] 1786, Smith & Payne *a.* Laing Arthur & Co., Dict. v. 3. p. 83.

[1] Molloy, b. 2. c. 10. § 27.

mance;[3] though, as before observed, a protest for non-acceptance, is, in general, advisable, if not necessary.[3] A protest against the drawer of a bill not accepted, for exchange, re-exchange, cost, damage and interest, was found equivalent to a protest for non-payment; though no mention was made, in the protest, of non-acceptance or non-payment.[4] It is not likely, however, that this would be sustained in the present day, when a compliance with the strict rules of negotiation is more rigorously exacted.

Protests for non-acceptance may be taken by any person who has the bill in his hand, against the drawee, either at his dwelling place, or, if he be dead, at the house where he last resided; but protests for non-payment must be taken by the person entitled to receive the money, or by some person duly authorised by him, either at the place of payment, if any place be specified; or, if no place be specified, then in the personal presence of the accepter; or, if he cannot be found, at his ordinary place of residence. And the instrument of protest must be drawn up and extended under the hands of a notary-public. It is customary, in demanding payment of inland bills or notes, for the

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[3] 1749, Jamieson *a.* Gillespie, Kilkerr. No. 23. p. 87.

[3] Ch. 4. p. 112.

[4] 1699, Yuille *a.* Richardson, Fountainhall, vol. 2. p. 64.

the notary to make a minute on the bill, of the day, month, and year, and to subscribe his initials; which is called *noting*. But noting, as distinguished from a protest, is unknown in law, and is merely a preliminary step, from which the protest can be afterwards at any time extended. No noting of foreign bills can take place; for the protest must be instantly made out, and transmitted, with notice, and as evidence, of the dishonour.

When the days of grace are expired, before diligence can be used against the accepter, as where a bill is indorsed after the period of payment, though the holder does not protest it, he preserves, as before noticed, [5] his right of recourse, if he presents the bill for payment, and gives intimation, within a reasonable time, to the other parties, of payment being refused.

Promissory notes may be protested, by the payee, against the grantor; and inland bills, payable to the drawer, may be protested, at his instance, against the accepter, at any time within six months after they are due, so as that summary diligence may proceed upon them, against these parties; but where there are other parties, recourse upon them will be lost, unless the notes or bills be regularly and duly protested in the manner above prescribed.

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[5] Ch. 5. p. 134.

A protested bill, after registration, cannot be transferred by indorsement, but by assignation, like other rights; for no decrees are transmissible by indorsation; and registration is, in the judgment of the law, a decree.[6] By the assignment, the whole privileges competent to the cedent or assignor, are vested in the assignee, who is not subjected to any exceptions that might be pleaded by the accepter against the original creditor in the bill.[7]

In protests of bills, it is not necessary, either that the witnesses, whose names are inserted in the instrument, should be designed therein, or that they should subscribe as witnesses. Without these formalities, the protest, with the bill, is sufficiently probative, both against the drawer and drawee.[8] A bill, drawn on a house in London, was found duly protested, though the notary was not present. His clerk presented the bill for payment, and returned with the answer to his master, who extended the protest at home, and inserted the names of two witnesses, as if they were present; this being according to the form and practice of London.[9] A bill may be protested for non-acceptance,

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[6] Erſk. b. 3. t. 2. § 31.

[7] *Ibid.*

[8] Stair, b. 1. t. 11. § 7.

[9] 1764, Stevenſon *a.* Stewart & Lion, Fac. Col. v. 3. p. 90.

ceptance, notwithstanding an offer has been made of a partial, qualified, or conditional acceptance, if the holder does not accede to that offer;[1] and, if he do not instantly agree to receive it, the drawee may retract. But if the holder acquiesces in an acceptance for part of the sum, which possibly may be to the extent of the drawer's effects in the hands of the drawee, he ought to protest for non-acceptance, as to the residue; and, on receiving the partial payment, when the bill falls due, protest for non-payment of that balance.[2] All bills that have been protested for non-acceptance, ought also to be protested for non-payment, when they become due.[3] When a bill is drawn on a person who is either unknown or cannot be found, it may be protested at the market cross of the town in which he was described to reside; and the protest should express, that strict search had been made for him.[4] A bill being drawn, which bore to be payable at no certain place, and protested at the head burgh of the shire where the accepter had his residence, the protest was found good.[5] If the holder be at a loss to know

[1] Stair, *ut supra.*

[2] Molloy, b. 2. c. 10. § 21.

[3] Poth. n. 133. Sav. tom. 2. ch. 14. max. 1. Boucher, n. 1502.

[4] Mar. p. 133. Scarlet, c. 11. r. 13. Forbes, p. 120.

[5] 1745, Creditors of Glendinning *a.* Montgomery, Kilker. (Arreſtment) N° 16. p. 41.

which of two persons of the same name a bill is drawn upon, and both refuse acceptance, he ought to protest it against both. [6] When he on whom a bill is drawn, upon the account of some particular person, for whom he does not wish to pay it, has funds of the drawer in his hands, he ought to allow it to be protested against himself, and then pay supra protest for the honour of the drawer or indorser. [7] The reason of which seems to be, that the drawer or indorser may thereby be informed of the drawee's sentiments with regard to the person for, or upon the account of whom, the bill is drawn, and that he paid merely for the honour of the drawer or indorser.

Where the original bill is lost, and another cannot be had of the drawer, a protest may be made from a copy, especially when the refusal of payment is not for want of the original, but for some other cause. [8] If no copy has been kept, a protest must, at any rate, be taken, in which must be expressed the cause of the bill not being prefixed. [9]

Besides

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[6] Scarlet, c. 11. r. 14.

[7] Sav. tom. 2. ch. 9. § 12. Scarlet, ch. 36. r. 19. Mar. 125. Beawes, n. 121.

[8] Kyd. p. 139.

[9] Poth. n. 145. Boucher, n. 1482. A bill being loft, a decree for payment was given on the fimple repreſentation of the proteſt, and the bill declared null.—n. 1483.

Besides the protest for non-acceptance and non-payment, there is, in England, and some other countries, a protest for better security, which is usual when a merchant, who has accepted a bill, becomes insolvent, or is publicly reported to have failed; or when the holder has good reason to believe it will not be paid; in such cases, he may demand better security; and, on that being refused, cause a protest to be taken to that purpose; which protest must, as in other cases, be notified by next post, whereby the drawer will be obliged to furnish further security, or make immediate payment, [1] being bound to the holder in the same manner as if a protest had been taken for non-acceptance. In Scotland there is no instance of the protest for better security. When a bill is protested for non-acceptance, the holder may instantly charge the drawer and indorsers for payment, contrary to the custom of most other places, where no demand is competent against these parties, till the bill becomes due. [2] But after a bill has been accepted, summary diligence can

[1] Molloy, b. 2. c. 10. § 32. Chitty, p. 128. Mar. 116.

[2] In England, if acceptance be refused, and the bill returned, an action may be immediately commenced against the drawer, though the regular time of payment, according to the tenor of the bill, be not arrived. Kyd, p. 111. An action lies by the indorsee against the indorser, upon a bill of exchange, immediately on the non-acceptance of the drawee, though the time for which the bill was drawn be not elapsed. Manning, p. 78.

only proceed in the case of non-payment. The holder must therefore wait the term of payment, and protest for non-payment and recourse, before he can make any demand upon the drawer and indorsers. If, however, the debtor in a bill be notoriously *vergens ad inopiam*, the holder has the ordinary remedy of an arrestment in security, which may be issued at his instance, and application, by any judge having a competent jurisdiction, upon production of the document of debt; and by this means he may attach the property and effects of the debtor in the hands of any third party, till sufficient caution be found for payment of the sum for which the arrestment has been laid.

CHAP.

CHAP. VIII.

OF THE NEGOTIATION OF BILLS.

THE doctrine of negotiation is unquestionably the most important in the whole law of bills of exchange, and has given rise to the greatest number of disputes. Though the subject, therefore, has been necessarily anticipated, in many points, in the four immediately preceding chapters, it requires, for a fuller discussion, to be treated of under a separate head.

The negotiation of a bill consists, either in acts that are voluntary on the part of the holder, such as indorsing it away, and uplifting the value, or in those that are necessary. In the latter sense, negotiation implies a right in the drawer or indorsers to require that the bill be duly presented for acceptance or payment; that if payment or acceptance be refused, it

be duly protested; and that notification of the dishonour shall be duly made to the parties concerned, on whom recourse may afterwards be claimed. By this right, consequently, a correlative duty is imposed on the holder, to present and protest the bill, and to give the requisite notification to the drawer or indorsers.

That the holder of a bill, who has been guilty of any neglect, and has not used exact diligence, should lose his recourse against the drawer, if the drawee should afterwards become insolvent, is a rule founded on the most equitable principle. For, as the drawer transfers, by the draft, the whole right he had to demand payment himself from the drawee, to the person to whom it is made payable;—if *he* allow the drawee to fail, when he might, by due negotiation, have recovered payment, it is but reasonable that he should suffer for his negligence, and not the drawer, whose hands were bound up by the draft.[1] But even when the drawee continues solvent, the law is the same; for, in that case, the holder can suffer nothing by losing his recourse against the drawer, as he may recover the sum from the proper debtor; and, therefore, is not to be indulged in an unnecessary action of

[1] Erſk. b. 3. t. 2. § 34.—1729, Flower *a.* Pringle, Dict. v. 1. p. 101.—1737, Adam *a.* Dick, Home, N° 54. p. 95.—1758, Tod *a.* Maxwell, Dict. v. 3. p. 84.

of relief against the drawer, which he is held to have renounced, by neglecting the due negotiation of the bill. [2]

It has been shown, in what has been said about the acceptance [3] and payment [4] of bills, that the holder is taken bound, in the event of non-acceptance or non-payment, to notify the same to the drawer and indorsers. It would be difficult to fix any particular period within which this notification should be made, as it must depend so much on the local situation of the parties, and other circumstances. In France, [5] intimation of the dishonour of bills must be given within fourteen days, to parties who reside in the kingdom within ten leagues of the place; and, beyond that distance, a day longer is allowed for every five leagues. To parties residing in England, Holland, or the Netherlands, notification must be made within two months; in Italy, Germany, and Switzerland, within three months; in Spain, within four months; and, in Portugal, Sweden, and Denmark, within six months. In terms of this regulation, where there are several indorsers to the bill, who perhaps reside in different

[2] Erſk. *ibid.*—1746, Littlejohn *a.* Allan, Falconer, v. 1. N° 147, p. 185.

[3] Ch. 4. p. 110.

[4] Ch. 6. p. 151.—Ch. 7. p. 171.

[5] Ordon. de Com. t. 5. art. 13.

kingdoms, the holder must intimate to the last indorser, within the limited time, according to the distance;—he to the next indorser;—and he, again, to the drawer in the same manner. [6]

In England, [7] and in this country, [8] the rule with regard to inland bills is, that notice must be given within fourteen days after the protest is taken; and as to foreign bills, the established practice and law in both countries is, that notice shall be given without any undue delay. What may be accounted an undue delay, must be, in a considerable degree, *in arbitrio judicis*, and determined from the circumstances of the case. But, in general, it may be laid down, that if the delay has been occasioned by the neglect or omission of the holder, or, what comes to the same thing, if it might have been prevented by the exertion of ordinary activity and despatch, recourse will be lost. Thus, if one post be lost in protesting the bill, and notifying the dishonour, [9] or, if notification is not given till the fifth day after the protest, when it might have been sent immediately, or at least within a shorter time,

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[6] Sav. tom. 1. liv. 3. ch. 6.—Poth. n. 153.

[7] 9. & 10. William III.—3. &. 4. Ann.

[8] 12. Geo. III. c. 72. § 41. made perpetual by 23. Geo. III. c. 18. § 55.

[9] 1743, Ramsay *a.* Hog, Dict. v. 3. p. 83.

time, the holder forfeits his right of relief.[1] But if the delay has been caused by any unforeseen accident, or fortuitous occurrence, the *porteur* will not be deprived of the usual remedy, if he has notified as soon as it was in his power to do so. For instance, if the failure to intimate arose from the holder's being ignorant of the indorser's place of residence, recourse will still be competent, if it be shown that immediate inquiry was made after him, and notification given as soon as his place of residence was discovered.

Bushby of Ardwell, in Scotland, when in London, put his name as indorser to a bill accepted by Graham, and delivered to Hodgson & Donaldson, payable in London two months after date. This bill, when it became due, was regularly protested against the accepter for non-payment; but the indorser having left London, and the holders being unacquainted with his place of residence in Scotland, no intimation of the dishonour was sent to him for twenty-one days thereafter. In a process, at the suit of the holders, for recourse against the indorser, who objected the want of due negotiation, the Lord Ordinary repelled the defence, in respect it was admitted that the defender left London, the then place of his residence, before the bill became due, and left no notice where he might

[1] 1774, Reynolds *a.* Syme, &c. Fac. Coll. N° 105. p. 280.

might be found, or wrote to. And this judgment was affirmed by the Court, and by the House of Lords, upon an appeal. [2]

Ker granted a promissory note for 217*l.* 11s. to Harper, or order, payable in London three months after date. This note Harper indorsed to Carrick of Glasgow, who indorsed it to Walker, one of the agents or riders of Johnston in Manchester. By Walker it was indorsed to Johnston his employer, from whom it came, by another indorsation, into the hands of Jones & Co. of London. On the last day of grace it was protested for non-payment by Jones & Co., and, within three days after, the dishonour was intimated to Johnston at Manchester. Walker, Johnston's rider, being at this time from home, Johnston, owing to his ignorance of the address of Carrick, the preceding indorser, did not give any intimation till the fourteenth day after the date of the protest; and the latter immediately gave notice to Harper, to whom the note had been originally granted. The contents of the note having been paid by Johnston to Jones & Co., and by Carrick to Johnston, a question arose, whether Harper was obliged to relieve Carrick of the loss; which was tried in the suspension

[2] 1782, Hodgson & Donaldson *a.* Bushby, Fac. Coll. N° 56. p. 88.—12. May 1783, Journals of the House of Lords.

suspension of a charge given to Harper. The Lords 'found the letters orderly proceeded;' thereby sustaining Carrick's claim against Harper for the amount of the note.—The judgment of the Court proceeded on this ground, that, in a question between two indorsers, it was sufficient, for authorising a claim of recourse, that, in intimating the dishonour, no improper negligence could be alleged. [3]

In conformity with the principle of these decisions, it was found, that a delay of twenty-one days in the notification of the dishonour of a promissory note, created by the miscarriage of a letter containing the notification, did not bar the holder's right of recourse. [4]

It may be here proper to observe, that bills drawn in Scotland, and payable in England, are accounted foreign bills; and the same strictness of negotiation is required with regard to them as in other foreign bills. [5]

Timely

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[3] 1790, Carrick *a.* Harper, Fac. Coll. N° 132. p. 259.

[4] 1799, Henderson *a.* Duthie, *ibid.* N° 104. p. 241.

[5] 1803, Ferguſſon & Co. *a.* Belſh, *ibid.* No. 111. p. 244.—A bill taken payable in England for the price of goods furniſhed in Scotland, renders the debt Engliſh: 1792, Watſon *a.* Renton, Fac. Coll. No. 197. p. 409.—And where a bill is drawn in a foreign ſtate on a perſon in Scotland, it creates, though not accepted, a debt which is held to be Scotch.

Campbell,

Timely notification of dishonour ought to be made to every indorser, whether prior or posterior, upon whom recourse is to be claimed. In inland bills, this notification should be made to the last indorser, within the legal period of fourteen days, and to a prior indorser, within the same period,[6] or at least without any undue delay; as means are thereby afforded the latter, of operating his relief, which delay may often frustrate: and without such intimation, a prior indorser is naturally put off his guard against an unforeseen claim, that might perhaps be allowed to lye dormant

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Campbell, a Scotſman, who was ſettled as a merchant at New-York, became indebted to Armour in the courſe of trade. Towards payment of a part of the debt, Campbell drew a bill on his father at Greenock, payable to Armour, which, however, was not accepted.

Soon afterwards Campbell became bankrupt; and, by the law of that State, obtained a ſtatutory diſcharge ſimilar to that reſulting from the certificate of conformity in England.

On his returning to Scotland, perſonal diligence was raiſed againſt him upon the bill, which he brought under ſuſpenſion, on the ground of the claim being extinguiſhed by the act of the *lex loci* above mentioned. The Court found, that, in the circumſtances of the caſe, the ſtatutory diſcharge obtained in the State of New-York, cannot bar the charger from recovering payment of the ſums due to him in this country by the ordinary diligence of the law of Scotland.—1792, Campbell *a.* Armour, Fac. Coll. No. 198, p. 417.

[6] By § 41. of 12 Geo. III. c. 72. it is provided, in general terms, that notice of the diſhonour of inland bills and notes, ſhall be given to the drawers and indorſers of the bills, and indorſers of the notes, within 14 days after the proteſt; from which it may be inferred, that the notification muſt be given within that period to all indorſers, prior as well as poſterior, if recourſe is meant to be claimed againſt the former.

dormant for years before an action was raised on it; which aggravates the hardship of being capriciously subjected to such a demand. Besides, if intimation was only necessary to be made to the last indorser, within the fourteen days, it would be in the power of the person in whose hands the bill was first dishonoured, by withholding the intimation till the fourteenth day, to throw the loss on any of the indorsers he chose to single out. It has accordingly been decided, that notification to the last indorser, is not sufficient, *per se*, to preserve recourse against the prior indorsers.

W. Bell granted to J. Bell, his promissory note for 560*l.*, which the latter indorsed to Grant, by whom it was indorsed to Elliot. Elliot not having recovered from W. Bell the grantor, intimated the dishonour to Grant the last indorser, but made no intimation to J. Bell the prior indorser, against whom, however, he raised an action of recourse. On considering the debate, the Lords found, as above, that notification to the last indorser is not sufficient, *per se*, to preserve recourse against the prior indorsers;—and remitted to the Lord Ordinary to hear parties further on the particular circumstances of the notification to Bell, or other specialties alleged for Elliot the pursuer. A proof of the circumstances relative to the notification was allowed by the Lord Ordinary; upon advising which his Lordship found, that the pursuer had failed

ed to prove such notification of the dishonour of the bill in question, or such other specialties as could subject the defender in an action of recourse: to which interlocutor, the Court adhered.[7]

When the claim of recourse is made on the first indorser, he cannot object that the holder ought to have notified the dishonour to the posterior indorsers; seeing that, if he satisfies the claim, no further demand can possibly come against them. To preserve recourse against him, therefore, it is not necessary to notify the dishonour to these indorsers.[8] Should the holder, in this case, fail to recover from the first indorser, he ought in strictness to resort to the indorser who is next ultimately liable, by which means the rights and remedies of the posterior indorsers would be less affected. But it would appear, from the English decisions, that as all the parties on the bill are equally liable to the holder, he is entitled, in the event of not obtaining payment from the drawer, to recur to the last indorser, and to demand payment from him.[9] It is questionable, whether this inversion of the usual order would be admitted

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[7] 1781, Elliot *a.* Bell.—Fac. Col. No. 36. p. 65.—Mor. Dict. Syn. p. 189.

[8] 1799, Henderson *a.* Duthie.—No. 104. p. 241. Fac. Col.

[9] Kyd. p. 112.

admitted in this country, unless due notification had been given to the whole indorsers. No doubt, all the parties on the bill are liable for the contents to the holder; and he has a right to insist for payment against any one of them. But these parties have also a right to insist on the bill being negociated according to the ordinary and established rules. If the holder, therefore, chuses to claim his recourse directly from the drawer, and to pass by all the other indorsers, without informing them of the dishonour, it is doubtful how far they ought to be responsible, in case payment has not been obtained from the drawer. Some of the intermediate indorsers may have become bankrupt in the mean time; and if a last indorser were obliged to retire the bill after a considerable lapse of time spent in seeking payment from the drawer, he might be deprived of his remedy, against the very person to whom he gave value for the bill, and upon whose credit he was induced to receive it: which would, in effect, be defeating the very end and purpose of strict negociation, which is established merely to obviate and prevent the occurrence of such losses.

Though the period for notification between indorsers themselves, is not yet fixed by any precise rule, it is sufficiently ascertained, that it behoves to be as speedy as possible, and such as is not protracted by

any undue delay; which will appear from the following case.

Wright and Beavis of Bristol, granted a promissory note to Batchin and Birkmyre of Paisley, for 167*l.*, payable at the house of Sir James Sanderson, and Co. London; Batchin and Birkmyre indorsed this note to Messrs Orrs of Paisley, who again indorsed it to Cleuch of Manchester. From him it passed, by indorsation, through many hands, till it was presented by Ralph of Moorfields, at Sir James Sanderson's house, and protested for non-payment on the 11th of June. Batchin and Birkmyre received no notice of the dishonour, till the 30th June, when they were informed by a clerk of Messrs Orrs, that it had returned dishonoured, and that they would be called upon for payment. Batchin and Birkmyre asked for the bill immediately, but it was not delivered to them till next day, when, being ignorant at that time of there being any undue delay on the part of Messrs Orrs, they paid to the latter its contents, and sending the note off for Bristol, received for answer, that Wright and Beavis had stopped payment. Batchin and Birkmyre, on inquiry, having ascertained that the note had been returned to Messrs Orrs on the 27th June, and that there had been a delay of between three and four days, till the 30th, in intimating to them the dishonour, brought, on that score, an action

action of repayment, against Messrs Orrs, for the value of this note. The defenders admitted, (what is the received doctrine), that the notification of dishonour betwixt indorser and indorser, ought to be within a space of time as short as possible, and not protracted by any undue delay; and they urged in excuse for their delay, that Mr Orr being at his country house, twenty miles from town, his clerk on receiving the letter which contained the bill on the 27th, sent it on the 28th, unopened, to his master in the country, who the next day returned it by post to Paisley, whence it became impossible to present it till the day following, viz. 30th June.—It was argued on the other hand, that this delay was unwarrantable; the dishonour ought to have been intimated on the 27th; and if a merchant chuses to leave his banking house and go to the country, he ought to commit his business to a responsible person, empowered to open his letters, and transmit such as require despatch. On the part of Messrs Orrs, it was attempted to be shown, that no injury had in fact arisen from the delay, as the bill, though it had been notified on the 27th as dishonoured, could not have arrived at Bristol before Wright and Beavis had committed an act of bankruptcy. The Court thought it unnecessary to investigate that circumstance. It was enough, that an undue delay of three days was clearly ascertained;

and, on that medium, they decerned for repetition against Messrs Orrs.[2]

Where the holder has failed in proper negotiation in general, the drawer is not obliged to show that damage was sustained, or that the accepter had become insolvent in the interim.[2] The holder is in all cases bound to strict diligence, and the least failure throws the hazard upon him. It is sufficient, in a defence against recourse, for the drawer to say he might *possibly* have recovered from the accepter.[3] But though regular notification be rigidly required where the drawer has funds in the hands of the drawee, because the former cannot otherwise take the steps which may be requisite for securing his property, yet if it be shown or admitted, that the drawee had no effects, strict negociation on the part of the holder is dispensed with, in so far as the drawer is concerned, in as much as he can sustain no loss on that account.[4]

The

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[2] 1792, Batchin & Birkmyre *a.* Orrs.—Dict. v. 3. p. 87.

[2] 1737, Adam *a.* Dick, C. Home, No. 54. p. 95.

[3] 1729, Flower *a.* Pringle, Dict. v. 1. p. 101.

[4] 1731, Mackenzie *a.* Urquhart, Dict. v. 1. p. 100. —1805, Hill *a.* Menzies & Anderson's truftees, Fac. Col. No. 211. p. 471.—Poth. n. 156.

If a merchant in Paris, fays Savary, indorfes and tranfmits a bill to his correfpondent in Lyons, with inftructions to receive and apply the

The necessity of due negotiation is also superseded, where the right of recourse among the parties is preserved by any other means. Thus, regular negociation is not necessary among co-cautioners in a debt constituted by bill, the recourse being established against each other by the bond of caution.[5] Where indorsers, however, are interested, it is no excuse for the failure in punctual notification to say, that the bill was in due time protested, and properly negociated in other respects, or that the drawee had no effects of the drawer in his hands.[6] Neglect of due negotiation, infers the loss of recourse by the indorsee against the indorsers, even though the accepter

the proceeds as *per* advice, and the bill is protested for non-payment, it is not necessary for the correspondent to notify the dishonour to the merchant at Paris, nor can he claim recourse upon him. For the merchant at Lyons having given no value for the bill, he is not the proper creditor, and has nothing to do but to return the bill and protest to his employer, that he may take the proper steps of negotiation, and operate recourse on those from whom he derived the bill. But if the merchant at Paris was debtor to the one at Lyons, or if he had remitted the bill to retire another which he had previously drawn on him, in that case the correspondent, in order to preserve his right of recourse, is taken bound to use exact diligence in making notification, as, by his accepting the prior bill, he had become a creditor of the Parisian merchant, and debtor to the person in whose favour the prior bill was drawn.—Tom. 1. liv. 3. ch. 6.

[5] 1803, Jarron *a.* Smith, &c. Fac. Col. No. 112. p. 246.

[6] 1761, Fairholms *a.* Sun-fire office, Fac. Col. No. 41. p. 86.

be bankrupt,[7] and whether the drawer had funds in his hands, or not.[8] For though it be a good reply to a drawer objecting undue negotiation, that he had no effects in the person's hands on whom he drew, yet it is no good reply to an indorser, who is not supposed to have any effects in the hands of the drawee. There is consequently a material and obvious distinction between the drawer and indorsers of an accommodation bill. The former receiving the money, has no right to relief from any one; but if an indorser shall pay, he has a right to operate relief against both the drawer and previous indorsers. This interest is the criterion by which to judge whether strict negotiation is necessary or not. Therefore, where bills are merely granted for the accommodation of the drawer, he is not entitled to plead the want of regular negotiation.[9] But in so far as onerous and *bona fide* holders are concerned, accommodation bills do not differ

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[7] 1748, Langley *a.* Hog, D. Falconer, v. 1. No. 160. p. 352.—1803, Ferguson & Co. *a.* Belsh, Fac. Col. No. 111. p. 244.—Manning, p. 42.—Poth. n. 147.—Boucher, n. 1482.

[8] 1755, Hart *a.* Glasford, Dict. v. 3. p. 84.—1773, Finlason *a.* Ewing, *ibid.*

[9] 1787, MacAdam *a.* MacWilliam, Fac. Col. No. 334. p. 514.

ter in the rules of negotiation from other bills.[1] Bills, too, indorsed in security, require to be duly negociated;[2] and the holder of a bill granted as a collateral security, is liable, like other holders, to strict negotiation.[3]

Precepts, or drafts, drawn on factors or agents, in security or satisfaction of debts, must be duly negotiated, to preserve recourse against the grantors.[4] In cases where the ordinary rules of negotiation cannot be observed, and consequently where they cannot apply,—as, where a bill is indorsed away after the term of payment is past, and is protested against the accepter for non-payment, and the indorser for recourse,—the latter will be found liable in recourse to the holder.[5] But though bills, indorsed after the term of payment, do not admit of the same strict negotiation as other bills, yet it is incumbent on the holder to notify the refusal to the indorsers within a reasonable time.[6] Where, however, all the debtors

[1] 1791, Orr *a.* Turnbull, Session papers.—Mor. Dict. p. 1617.

[2] 1762, Murray *a.* Grosset, Dict. v. 3. p. 89.

[3] 1794, Reid *a.* Coats, *ibid.*

[4] Earl of Leven *a.* Earl of Glencairn, D. Forbes, p. 555.

[5] 1777, Cooper *a.* Clark, Dict. v. 3. p. 85.

[6] 1749, Forbes *a.* Young, *ibid.* p. 91.

in a bill become bankrupt, and claims are entered on their estates before the term of payment, negotiation, as it can serve no end, is unnecessary; and the want of it cannot be objected by the creditors. [4]

The notification of dishonour should be specific, and ought to give the particulars of the bill; such as, the sum, date, parties' names, and period of payment, so as to make it impossible to mistake what bill is meant; and should also express when the protest was taken, and the holder's intention of claiming relief: for, unless the dishonour be notified in a manner so distinct as to leave no room for uncertainty, recourse will be lost. [5]

W. MacLean of Inverness, drew upon his son J. MacLean of London, on the 19th November, for 150*l.*, payable twenty days after date, to Hogg in Edinburgh, for value in account with him, as per advice. This bill was sold, blank indorsed, to T. & A. Fairholms of Edinburgh, who transmitted it to Johnston of London, whose name came to be filled up in the blank indorsation; and was accepted by J. MacLean the drawee. The bill falling due on the 8th February, was protested on the 11th for non-payment, and an action of recourse brought against Hogg the

[4] 1792, Creditors of MacAlpine *a.* Parsons, *ibid.* p. 88. —1794, Harrisons *a.* Chippendale, *ibid.* p. 89.

[5] Savary, tom. 1. liv. 3. ch. 6.

the payer and indorser, who pleaded that the dishonour of the bill had not been duly notified. To which it was answered for the pursuer, that it had been duly notified to the defender by a letter from the accepter himself, acquainting Hogg of his having been obliged to redraw on him for payment of it, and by the said draft being sent down to J. & A. Fairholms, factors for the holders, and presented to him for acceptance. But as this letter from the accepter did not particularly bear, that the redraft he had given to Johnston the holder was on acount of the bill, but only stated, in general, that in order to retire a bill of his in Johnston's hands of 150*l*., he had, of that date, drawn on him for that sum, it was not sustained as sufficient notice. The Lords found, that notification of the dishonour of a bill must be distinct and positive, especially when it is given to an indorser; as the only purpose of notification to him is, that he may thereby be entitled to operate his relief against the drawer; and that no other is sufficient than what may put him in safety to sue and attach the effects of the drawer for his relief. [6]

It appears, however, that private knowledge of the dishonour is tantamount to a notification.

[6] 1747, Johnston *a*. Hogg, Kilker. (B. of Exch.) N° 14. p. 79.

An action of recourse was brought against the indorser of a bill, of the dishonour, whereof no regular intimation had been given; yet, from private knowledge, the indorser could not be ignorant of the dishonour. The Lord Ordinary found him liable; which the Court confirmed, and found expenses due. It was observed on the Bench, that when an indorser hears nothing of a bill for some time after the term of payment, he is entitled to presume it is paid: hence, in general, without intimation, an indorser cannot be made liable. But in the present case, the parties saw each other every day, and the whole circumstances of the case came to be equivalent to regular intimation. The indorser knew, from circumstances, that the bill was dishonoured. In particular, he was present when the accepter made a partial payment. [7]

Evidence of notification to the drawer was likewise inferred, from an acknowledgement of his own in a posterior deed; wherein, among other sums, he debited himself with that in the bill, to the holder, at the time.

Martin, on the 20th December 1764, drew a bill on Kellar, payable to the drawer four months after date. It was indorsed for value to Johnston, and by him to Nisbet, in whose hands it remained till it became

[7] 1791, Irvine *a.* Caddel, Mor. Dict. p. 1617.

came due, 20th and 23d April 1765. Kellar, the accepter, having become bankrupt about the middle of February preceding, absconded; and Coulter having come to have right to the bill, as creditor of Nisbet, brought an action of recourse against Martin the drawer, by whom it was objected that the bill was not duly negotiated, in respect there was no proof of its dishonour being notified. To which it was answered by Coulter, that as Martin had acknowledged himself debtor to Nisbet the last indorser for the contents of the bill, the notification of the dishonour was thence to be presumed; and that the notoriety of the accepter's bankruptcy before the bill became due, was equivalent to an actual notification, and excluded the supposition of any damage to the drawer from the want of it. The Court went upon the particular circumstances of the case, and found, from the drawer's having acknowledged, in a disposition by him to Nisbet and others as trustees for his creditors, that he was owing Nisbet the sum of 514*l.* 17s. 6d., which *included* the sum in the bill in question, that sufficient evidence was adduced of the dishonour having been properly intimated to him, [s]

But an execution of horning, reduced from informality,

[s] 1775, Coulter *a.* Martin, Fac. Col. No. 174. p. 90.

mality, was not sustained as evidence of an intimation of the dishonour of a bill. [9]

The usual way of notifying the dishonour of a bill, is by a card or letter sent by the holder, when the parties live near each other; or transmitted by the post, when the parties live at a distance. In the event of the notification being denied, it may be proved, in the former case, by the person by whom the letter was delivered; in the latter, by the person who put it into the post-office; [1] or it may be proved by the holder's letter-book. But where none of these modes of proof can be had, it would seem that the oath of the holder, or of the agent employed by him, will be received as sufficient evidence of intimation having been given.

A bill drawn on a house in London, had been indorsed by W. and J. Douglas in Glasgow to Brown, agent in the same town for Douglas Heron & Co., when it was again indorsed to Sir George Colebrooke & Co. in London. The bill being presented to the drawers, first for acceptance and then for payment, both were refused; upon which Colebrooke & Co. used diligence against W. and J. Douglas, who brought a suspension of it, on the ground that due intimation of

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[9] 1787, The Stirling Banking Company *a.* Duncanson's representatives, Bell's Cas. p. 111.—Session Papers in Signet Hall.

[1] Chitty, p. 210. Kyd, p. 273.

of the dishonour had not been made to them. Colebrooke & Co., the chargers, on the contrary, affirmed, that timely notice of both refusals had been given to the suspenders by Brown, their door neighbour, being communicated to him by the cashier at Edinburgh, who had received it from London; in support of which averment, they produced the cashier's letters to Brown, with a notandum added to each of them in Brown's handwriting, bearing, that he had read or shown them to the suspenders. And they concluded, that this evidence ought to be held as sufficient; at least, that it might be rendered complete by the oath of Brown. The Court was of opinion, that the alleged mode of intimating the dishonour was sufficiently formal; and that, if the evidence arising from the markings, affixed by Brown to the cashier's letters, were corroborated by Brown's oath, this would be satisfactory evidence of such intimation. And he having given his oath, W. and J. Douglas were found liable.[2]

The oath of a partner, in corroboration of a private marking of his own, will also be received as sufficient evidence of due notification.[3]

When notification is made, it is not necessary for the holder of the dishonoured bill, in pursuing recourse,

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[2] 1780, Colebrooke & Co. *a.* Douglas, Fac. Coll. No. 118. p. 217.

[3] 1781, Douglas Heron & Co. *a.* Alexander, *ibid.* No. 34. p. 59.

course, to return the bill and protest to the drawer, unless he pay the amount. These are the holder's documents of debt, which he cannot safely, and is not bound to part with, until actual payment is received.[4]

[4] 1756, Hawkins & Co. *a.* Cochran, Sel. Dec. No. 130: p. 186.—1760, Coutts & Co. *a.* Nisbet, Fac. Coll. No. 262. p. 488.

CHAP.

CHAP. IX.

OF THE PRIVILEGES OF BILLS.

Besides the privileges of bills that we have already had occasion to mention, these documents are peculiarly privileged in other respects, of which it is extremely necessary that some notice should be taken.

It has been shown,[z] that bills are complete in themselves, without witnesses, or any of the statutory formalities essential to the constitution and validity of other writs. They prove their own dates, whether they be holograph of the drawer or not; whereas holograph deeds of any other description, do not prove their dates, unless attested by witnesses. But though this rule, with regard to the date of bills, be necessary

[z] Ch. 3. p. 85.

sary for the security of merchants in their transactions with proper bills of exchange, it seems doubtful how far, in questions with heirs or creditors, it ought to extend to these instruments, when employed merely to constitute, and as vouchers of, debt, such as bills payable to the drawer, and promissory notes. For by antedating notes and bills of this description, the most easy and dangerous modes of affecting the rights of heirs, and defrauding creditors, might be introduced. Heirs, for instance, might be cut off from the plea of deathbed; inhibiting creditors from the benefit of their legal diligence; and husbands sued for the personal obligations of the wife, might be deprived of the defence that such obligations had been granted subsequent to marriage.[2]

For these reasons, apparently, it has been decided, that a bill granted on deathbed does not prove its onerous cause;[3] and that it is competent to prove by witnesses, against an onerous indorsee, that a bill was granted on deathbed as a legacy, was not delivered, and was not signed by the drawer during the grantor's life.[4]

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[2] Erſk. b. 3. t. 2. § 22.

[3] 1734, Chriſtiſons *a.* Ker, Dict. v. 2. p. 255.

[4] 1757, Farquhar *a.* Shaw, Kam. S. Dec. No. 137. p. 193.—See alſo Duncan *a.* His Majeſty's Advocate, 1754, Fac. Coll. No. 103. p. 152.

As the acceptances of bills, payable at a certain period after date to the drawer, are seldom dated, questions have arisen whether or not the acceptance is in all cases to be presumed of the date of the bill. In a cause that was determined in 1702, the Court refused to sustain this presumption, unless it was supported by proof.[5] But, in a subsequent case, it was found, that an accepted bill proved its own date against the accepter's heirs;[6] and from this authority, as well as from the analogy of indorsations, it may be considered as a rule, that an acceptance of an inland bill, payable to the drawer, if not dated, will be considered of the date of the bill; and, where it is dated, will be held as of that date till the contrary be proved.[7]

What remains to be observed, concerning the privileges of bills, may be conveniently comprised and discussed under the four following heads. 1*st*, Whether bills require intimation; 2*dly*, How far bills are subject to compensation; 3*dly*, How far bills are arrestable; and, 4*thly*, For what period bills retain their extraordinary privileges.

I.

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[5] Man *a.* Wales, Dict. v. 1. p. 90.

[6] 1725, Kennedy *a.* Arbuthnot, Edgar, p. 185.

[7] 1794, Thistle Bank *a.* Leny—See also Norris *a.* Heirs of Sir John Wood, Dict. v. 4. p. 168.

I. *Whether bills require intimation.* By the law of Scotland, the possessor of any right may, in general, assign or dispose of it at his pleasure. By such assignation, the subject assigned is fully vested in the assignee; and, in personal rights, this transference is completed by delivery of the right assigned, together with the deed conveying it. But as debtors are not presumed to know that their debt has been made over to a third party, and therefore cannot, by the conveyance, be put *in mala fide* to pay to the original creditor, it is necessary that the assignation be intimated or notified to the debtor, to let him know that he must make payment, not to the first creditor, but to the assignee who has now come in his place. In the assignation of common debts, this intimation is an essential requisite, not only for interpelling the debtor from paying to the original creditor, but for completing the conveyance. Hence, though an assignation not intimated be valid against the grantor, who cannot quarrel his own deed, yet if, before intimation of a first assignment, the assignor shall grant a second one of the same subject to a different assignee, the second assignment, if first intimated, is preferable to the first.

Bills, according to our two highest legal authorities,[a]

[a] Stair, b. 1. t. 11. § 7. and b. 3. t. 1. § 12.—Ersk. b. 3. t. 5. § 6.

ties, require no intimation, but effect a complete transference of the right without this otherwise necessary formality. It is certainly true, that the indorsement of an accepted bill of exchange is a complete assignation of the right to its contents in favour of the indorsee; and, from the privileges of bills, this assignation does not stand in need of being intimated to the accepter. But the doctrine of no intimation being necessary, in any conveyance by bill, seems to be rather questionable. The act of drawing a bill in favour of a payee, is an assignment to him of the funds which the drawer may have in the hands of the person drawn upon. But this assignment is not completed, so as to secure the payee, until the bill is presented to the drawee for acceptance, and intimation thereby given to him that the drawer, by the draft, has transferred the debt to the holder; for, until such intimation be made, he cannot be supposed to know of the debt being assigned; and, therefore, may either pay to a person holding a subsequent draft, or to another creditor of the drawer who may have attached the amount in his hands.

Burn drew a bill, dated 30th July 1731, on Dalziel, payable to Kerr of Houndwood, or order, betwixt and Martinmas then next, which was presented and protested for non-acceptance 6th May 1732.

Burn drew another bill, dated 6th August 1731, upon Dalziel, payable to Parkhill, or order, against

Whitsunday thereafter, which was indorsed by the payee to Chalmers, and protested for non-acceptance 7th August 1731.

Ker, the pursuer of an action, as representative of Ker of Houndwood, to whom the first bill was payable, in a competition before the Sheriff, pleaded preference on the debt due by Dalziel, as having the first bill drawn upon him. The Sheriff preferred Chalmers, holder of the second bill, as having the first protest for non-acceptance; which decision was affirmed by the Lord Ordinary in an advocation.[9]

In this case, it was urged for Chalmers, that the debt due by Dalziel to Burn was not constituted by bill; and no conveyance of a debt, not constituted by bill, can have the privilege of indorsation of a bill, so as to be effectual without intimation. A bill not indorsed, would not be preferable to an assignation intimated before the bill was presented to the debtor, consequently would not be preferable to a bill, posterior in date, first intimated. It is of no importance that Mr Ker's bill was first payable; for the second bill contained no information to acquaint the persons to whom it was directed that any former bill had been drawn. It was a simple draft, to pay a certain sum at

[9] 1737, Ker *a.* Chalmers, Dict. v. 1. p. 97.—Session Papers.

at a certain day. It was presented, and intimated to the debtor, before the prior bill. The first intimation completed the conveyance, whatever was the term of payment; nor can the time when the competition occurred make any difference.

The protesting of a bill for non-acceptance, is equivalent to an intimated assignation; [2] and even a verbal intimation of a draft is sufficient notice to the drawee. [3]

One might apprehend that the indorsee of an unaccepted bill could be in no better situation than the indorser from whom he derives his right; and that if to interpel the drawee from paying *bona fide* to a posterior order, intimation be necessary, the necessity holds as much in regard to the indorsee, as to the original payee, in whose place he stands. This conclusion, however, though it seems sufficiently tenable on reasonable principles, does not appear to be supported by any authority. It has been found, that the indorsee of an unaccepted bill not intimated, was preferable to a posterior arrester who had attached the funds in the debtor's hands. [3] There is evidently, however, no

[2] 1734, Mitchell *a.* Mitchell, Dict. vol. 1. p. 97.—1768, Gavin *a.* Kippen & Co. Fac. Coll. No. 79. p. 327.—1778, Spotiswood *a.* MacNeil, *ibid.* No. 18. p. 33.

[3] 1724, Fairholm *a.* Gordon, Edgar, p. 20.

[3] 1698, Ewing *a.* Geills, Fountainhall, v. 2. p. 11.

ground of expediency for any distinction betwixt a a payee and an indorsee; for though indorsations are, from motives of utility, more privileged in some instances than bills themselves, yet, if intimation be at all requisite to put the drawee *in mala fide* to pay to a posterior order or arrester, there is no reason why an indorsee should not be bound to intimate, as well as the person to whom the bill was originally made payable. At all events, the consideration of the foregoing cases more strongly enforces what has already been frequently inculcated, that as soon as a bill or draft is received, it should, without the smallest delay, be presented by the holder for acceptance; and, in case of refusal, protested; as, by this means, the holder not only preserves his right of recourse against the drawer, but, by the intimation given by the presentment and protest, effectually precludes the drawee from paying to another, in case he has funds in his hands; and a double security is thus afforded to the holder for his money.

A bill, protested for non-acceptance, divests the drawer of the funds for which the bill was drawn, in favour of the payee, so as to exclude other claimants. [4]

But

4 1724, Stewart *a.* Elliot, Edgar, p. 32.—Fallope & Co. of Paris, drew upon the house of Guignes of Leghorn, on the 14th Messidor of the year 5 (1. July 1796), a bill of exchange, at sight, for 5200 piastres, payable to the order of Francis Devink. On the 18th of

But this doctrine is also liable to exceptions; for if the draft be for a greater sum than is in the hands of the drawee, and the holder does not, within a reasonable time, limit his demand to the sums acknowledged to be due by the former, these sums will not be attached or carried by the draft.

Hogg, in consequence of an order from S. Fraser, drew bills for 154*l.* on J. Fraser, who refused to accept, because the sums in his hands belonging to S. Fraser amounted only to 55*l.* 7s. 2d. But he offered, for the accommodation of his correspondent, to honour a bill of exchange for 100*l.*; which, however, he was not required to do. Hogg took no further measures for 13 months. By this time, S. Fraser had become insolvent, after J. Fraser had interposed his

of the same month Fallope & Co. failed. On the 28th, Neveu & Co. of Geneva attached in the hands of Guignes the whole sums owing to the house of Fallope & Co. The bill, of which Devink was the holder, was presented by him for acceptance; and on the answer made by Guignes the drawee, that his hands were tied up by the attachment, it was protested for non-acceptance. Neveu & Co. afterwards loosed the arrestment, and obtained payment of the funds belonging to Fallope & Co. Devink being himself a debtor of the house of Neveu & Co. in an account-current with them, passed to his credit the 28,000 francs, the amount of the 2500 piastres for which the bill was drawn. Neveu & Co. having refused to admit this, the question came to be tried before the Tribunal of Commerce, of the department of the Seine, which decided, that Neveu & Co. should allow Devink credit for the above sum, which had been carried, by the bill in his favour, drawn on the house of Guignes. And, upon an appeal, this judgment was affirmed by the Tribunal of Paris.—Journal du Palais, Boucher, p. 211.

credit for him to a considerable amount. An action was then brought by Hogg, in which, in order to subject J. Fraser to the payment of *55l.* 7s. 2d., it was pleaded, That the drawing of a bill of exchange, or, what is the same thing, the giving authority to make such a draft, is equal to an irrevocable assignment of those effects of the drawer which are at the time in the hands of the drawee. To which it was answered, That if the pursuer had, within a reasonable time, limited his demand to the sums acknowledged to be due by the drawee, his present claim might have been deemed a just one. But it would be attended with the most pernicious consequences, if, by such unfinished transactions as here occurred, any restraint should be introduced on the freedom of commercial dealings. The Court sustained the defence, and found the pursuer liable in expenses. [5]

And where the person drawn upon has not money but effects of the drawer in his hands, these effects will not be carried or attached by the draft in preference to a posterior arrestment of them.

Fall & Co., merchants in Dunbar, had in their hands a parcel of dry fish belonging to Sinclair, which they had undertaken to transport to Barcelona on Sinclair's risk, and to account to him for the proceeds. Sinclair drew a bill on Fall & Co., payable to Ewing, which

[5] 1786, Fac. Coll. No. 296. p. 455.

which the Falls having refused to accept, as they had no cash in their hands at the time, Ewing protested for non-acceptance.

About a month thereafter, and while the fish were still on hand, Stewart, a creditor of Sinclair's, arrested in the hands of Falls.

In a competition that ensued between the holder of the bill and the arrester, the Lords having remitted to the Ordinary to take the opinion of merchants, Whether a bill protested for not-acceptance against a person who has only effects and not value in his hands, is, by the custom of merchants, equivalent to an intimated assignation to these effects, so as to prefer the holder of the bill to one who thereafter arrests before the effects be turned into money? The most noted merchants of Edinburgh made answer, That they always understood, that protesting a bill drawn upon a correspondent, for answering which he had in his hands a cargo that may produce money, was sufficient to affect such goods, or the produce of them, when turned into cash, without the form of an arrestment; and that they had relied on bills so protested, as equal to an assignation intimated.

Notwithstanding this opinion, the Court found, 'That the protesting the bill against Fall & Co. for not-acceptance, when they had no money of the drawer's in their hands, did not affect the parcel of fish in question, then in their hands, so as to prefer the porteur of that bill to a subsequent arrester: And

therefore preferred the arrester to the sum of 68*l.*, being the value of the fish, now turned into money.'

Lord Kilkerran, in reporting this case, makes the following observations. 'The ground the Lords went on, was, not what had been chiefly argued for the arrester, That a correspondent who has no cash but only effects in his hands, is not bound to accept a bill: for neither is he bound to accept even where he has cash of the drawer's, when the bill is drawn for a greater sum; yet, the draft and protest will be an effectual conveyance to the extent of the sum in his hands. But the ground was this, That an assignation to a sum of money as due by a third party to the cedent, will in no case imply a conveyance to effects of the cedent's that may happen to be in his hands; and the implied assignation by drawing a bill, cannot have a stronger effect than an assignation itself, to so much money as due by the person on whom the bill was drawn would have had;—*Cum fictio in casu ficto*, &c.

'It was at the same time admitted, that where, in such a case, the effects are, after protesting the bill, turned into money, action would lye to the holder of the bill, where no mid impediment had intervened. Not that the drawing of the bill implied an assignation to the effects; for such action would lye to the holder of the bill when the correspondent on whom it was drawn came afterwards to have the drawer's cash in his hands, though, at the time the bill was protested for not-acceptance, he had neither cash nor effects of the

the drawer's; while yet, for certain, such draught would not import an assignation to money that came only into the correspondent's hands after the protest for not-acceptance: But on this ground, that the mandate, or order to pay, is supposed to continue, and will have effect, how soon the correspondent comes to be possessed of value; but still under this exception, unless a mid impediment has intervened: And such the arrestment was considered to be in this case, as it is a habile diligence to affect the subject, and is, for that reason, preferable to the action. And therefore it was, that, by the interlocutor here pronounced, it was only found, that the protesting of the bill did not affect the fish, *so as to prefer the porteur to the subsequent arrestment.*'[6]

It has been already observed,[7] that bills or precepts

[6] 1744, Stewart & Ewing Competing. Kilkerr. (Bill of Exch.) No. 10. 75. This case deserves the particular attention of merchants, as it seems to clash in some respects with mercantile principles and practice. The observation of Lord Kilkerran is no doubt just, that an assignation to a sum of money due by a third party to the assignor, does not imply a conveyance to the assignor's effects in his hands; and that the implied assignment by drawing a bill, cannot have a stronger effect than an assignation itself. But it certainly often happens, in the exuberant confidence of commercial transactions, that bills are drawn on the consignee of a cargo, and taken in payments from the drawer by indorsees, on the faith and supposition, that the consignment will cover and secure the debt. If the drafts, however, and the intimation of them, are not to be considered as a sufficient transference of the property to the holders, so as to exclude posterior claimants, it might tend materially to diminish the confidence, and interrupt the despatch of mercantile dealings.

[7] Ch. 3. p. 68.

cepts for fungibles have not the privileges of bills of exchange; and therefore, a precept drawn by one person in favour of another, ordering a third to account to him for 190 bolls of salt, and 51 stones of iron, was found to require intimation; and a posterior arrestment of the debt and effects was sustained.[8]

Bank-notes, or bank-bills, which law considers as cash, or ready money, are fully transferred by mere delivery, without any intimation. And even where one offers a proof that a particular note had been his property, and was taken from him either by stealth or violence, though payment may be refused to him who was guilty of the theft or robbery, yet the note, the moment it is out of his hands, is no longer affected by the circumstance, or like other moveables subject to a *rei vindicatio*, but must be paid to the holder;[9] which arises both from the nature of bank-notes, and from the plain intention of the law authorising banks.[1]

If, then, the decision in the case of Ker *a.* Chalmers is to be received as authority, and there appears no good cause why it should not, the following deductions may be drawn from the preceding paragraphs.

1. That

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[8] 1706, Anderson *a.* Turnbull, Dict. v. 1. p. 96.

[9] 1749, Crawfurd *a.* The Royal Bank, *ibid.* v. 3. p. 47,

[1] Ersk. b. 3. t. 5. § 6.

1. That a protest for non-acceptance is equivalent to an intimated assignation, so as to debar the drawee from paying to a subsequent order, and to exclude the claims of other parties; but where effects, and not money, are in the hands of the drawee, an intimation by protest is not preferable to a posterior arrestment of the effects. 2. That, as in the case of common assignations, the first intimation of a bill or draft, is preferable to a prior bill last intimated. 3. That a simple indorsation on a bill, makes a full conveyance without the necessity of intimation; though a bill not indorsed would not be preferable to an assignation intimated before the bill was presented. 4. That a bill when intimated divests the drawer of the money for which the bill was drawn; but if the holder does not within a reasonable time limit his demand to the amount acknowledged by the drawee, the sum in his hands will not be attached. 5. That bank-bills and notes are transferable by mere delivery, without intimation. And, 6. That bills or precepts drawn for fungibles, in all cases require intimation, to exclude the diligence of other creditors.

II. *How far bills may be compensated.* Compensation is defined to be the contribution and concurrence of debit and credit, between any two parties who are reciprocally debtor and creditor to each other at the same time, and each in his own right, in debts which

which are of the same species and quality, so as that the one may be set off against, or pleaded by way of exception to, payment of the other. Bills are so far privileged, that in the hands of an onerous indorsee, they cannot be compensated by any debt owing to the accepter by the original creditor.[2] Where only two parties are concerned, however, all objections are competent *hinc inde* by the one against the other, as in common contracts; and the accepter of a bill, or grantor of a note, may set off any liquid and acknowledged debt owing to him by the drawer of the bill or payee of the note, in payment and extinction in full, or *pro tanto*, of the sum in the bill or note.[3] But compensation of a bill cannot be pleaded upon an open account against which the triennial prescription has run before the date of the bill.[4] And in the suspension of a charge on a bond, where the suspender craved compensation of a sum due to him by the charger *per* bill, the charger was allowed to plead recompensation, because he was cautioner for the suspender in a bond for a greater sum, and therefore was

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[2] 1699, Stewart *a.* Gordon, Dict. v. 1. p. 98.—1748, Tudhope *a.* Turnbull, Kilkerr. No. 61. p. 81.

[3] 1706, Plumber *a.* Houston, Dict. v. 1. p. 98.—1714, Arbuthnot *a.* Newgrange, *ibid.*

[4] 1773, Clark *a.* Buchanan, *ibid.* v. 3. p. 150.

was entitled to retention of the sum in the bill, till he was relieved of that cautionary obligation. [1]

Formerly, when bills had been allowed to lye over for some considerable time, without diligence having been used, compensation was received against them as common debts. [2] But since the 12. of George III., by which bills retain their extraordinary privileges for six years, [3] it has been found that compensation is not pleadable against the onerous indorsee of a bill, though it may have lain over two years after its date, and eighteen months after the time of payment, without any demand being made, or diligence used. [4]

Bank notes, payable to the bearer, are obviously exempted from compensation; and one who grants a draft on his banker, payable to the bearer or his order, on demand, is not entitled to plead compensation in a question with an onerous holder of it, upon a debt due to him by the person to whom the draft was originally delivered. [5] Nor can the accepter of bills indorsed by the drawer, before the term of payment,

[1] 1711, Irvine *a.* Menzies, *ibid.* v. 1. p. 168.

[2] 1749, Thomson *a.* Colvil.—1762, Smith *a.* Douglas, *ibid.* v. 3. p. 91.

[3] 1787, Robertson *a.* MacGlashan, Fac. Coll. N° 309. p. 477.

[4] 1777, Elliot *a.* Mackay, Dict. v. 3. p. 91.

[5] 1794, MacGilchrist *a.* Arthur, Fac. Coll. N° 89. p. 200.

ment, to his creditors' factor, upon a receipt, bearing that the value, when paid, should be remitted to the creditors on account of the debt, plead compensation on a relative bill, of the same date, granted to himself, partly as creditor of the drawer in a balance due on former transactions, and partly in consideration of his own acceptances.

Crosbie, on 2d December 1773, granted two acceptances to Sheriff for 150*l.* each, the one payable at three, and the other at six months after date; and Sheriff, on the other hand, granted his acceptance to Crosbie for 700*l.* The two bills accepted by Crosbie were, soon after, indorsed by Sheriff to Sir William Forbes James Hunter & Co., who granted the following receipt. 'Received from Mr Alexander Sheriff his two bills on, and accepted by, Andrew Crosbie Esq., 150*l.* each, which, when paid, we shall remit the value to Herries & Co., on account of the debt owing them by Messrs Sheriff & Guthrie.' Sheriff failed in February thereafter; and, upon the 1st March, a protest was taken against Sir William Forbes & Co., stating, in substance, that Crosbie had only accepted these two bills, to enable Sheriff to raise 300*l.* by discounting them, to pay a bill which he owed to Mansfield Hunter & Co., for which he and another gentleman were bound; and being a creditor of Sheriff himself in 400*l.*, had got a bill of the same date with the two 150*l.* bills from Sheriff

Sheriff for 700*l.*; as the amount of these two bills and the debt of 400*l.*, being the balance due to Crosbie on former transactions; and therefore, that he was entitled to compensate the two 150*l.* bills, with the 700*l.* bill, as the two coeval bills had not been purchased in the way of commerce, but indorsed in security of a prior debt. Crosbie, in order to take the opinion of the Court upon his plea of compensation, presented a bill of suspension of the two bills accepted by him. The Lords repelled the defence of compensation. [6]

In the diversified transactions of merchants, many complicated questions have occurred with regard to the claims of compensation and retention upon bills in bankruptcies. For information relative to these, a reference is made to that part of the work which treats of cross ranking, under the title of 'Bills in relation to bankruptcy.'

III. *How far bills are arrestable.* Arrestment, as a diligence competent to a creditor, is the command of a judge, issued at the instance of the creditor, by which he, who is indebted in a sum of money, or other personal obligation to the arrester's debtor, is prohibited from paying the debt, or performing the obligation, till the debt due to the arrester

[6] 1775, Harris & Co. *a.* Crosbie, Fac. Coll. N° 162. p. 44.

retter be paid or secured. The person in whose hands the diligence is used is called the arrestee.

Bills, according to Erskine, are not arrestable; for being considered as bags of money, which pass from hand to hand, they cannot be affected by any burden in the person of the possessor.[7] It seems to be a favourite phrase with our lawyers, to compare bills to bags of money; but the similitude is rather injudicious in some cases, and in none more so than in the present case. A bag of money belonging to a debtor may evidently be arrested in the hands of a third party; but it is not so certain that a bill can; which arises from a principle of dissimilitude, rather than of similarity. Bills, as peculiar instruments of commerce, are favoured in a way that bags of money certainly are not. As a general rule, and wherever the privileges of bills are concerned, the doctrine laid down by Erskine, that bills are not arrestable, is sufficiently correct; but, like other general rules, it appears to admit of exceptions. It is easy to figure a variety of cases where a debt constituted by bill may be affected by arrestment. For instance, an agent in this country sells goods on commission for a house in England to the extent of 5000*l.*, and takes bills from the purchasers for the price, which he indorses to a third party for his behoof, and afterwards fails or absconds. The

[7] B. 3. t. 6. § 7.

The English house uses arrestments in the hands of the gratuitous indorsee, with the view of attaching the debt in his custody. It would be hard to say, that this arrestment was of no avail, upon the general brocard, that bills are not arrestable, and that the sum in the arrestee's hands could not be secured by this diligence, merely because the debt was constituted by bill. On the contrary, it may be presumed, that such an arrestment would, upon equitable principles, be sustained as perfectly valid; and that the gratuitous indorsee would be made liable in breach of arrestment if he afterwards indorsed away the bills.

The decisions upon the point are by no means uniform, and, indeed, are rather at variance with each other. In the case of Jamieson *a.* Leckie,[8] it was decided, that bills deposited, blank indorsed, cannot be arrested in the hands of the depositary. By a subsequent decision, it was found, that an arrestment in the hands of a trustee will carry the sum in a bill not due, in preference to an arrestment in his hands after the bill was paid to him.

[8] 1729, Dict. v. 1. p. 56. In opposition to this case, Mr Bell, in his Commentaries, v. 2. p. 358 (note), mentions that of Douglas Heron & Co. *a.* Malcolm, 9th March 1782, which is not reported. Malcolm having in his possession bills to the amount of 4000l., belonging to Brown, an arrestment was used in his hands by Douglas Heron & Co. The arrestee having notwithstanding delivered the bills to Brown, was found liable in breach of arrestment.

Bills were drawn by Gordon on certain persons indebted to him, payable to Falconer, which, by Falconer's oath, were ascertained to be for the drawer's behoof. Innes, a creditor of Gordon, arrested in Falconer's hands after the draft, but before Falconer had recovered payment from the debtors. The question was, if these arrestments in Falconer's hands affected the sums in the bills? The Lords found that the arrestments did affect the sums in the bills,—for this reason, that, by the very drawing of the bills by Gordon upon his debtors, the right to the money was transferred to Falconer, who thereby became liable to account; and, for that reason, arrestment in Falconer's hands was not only thought habile, but to be the proper method of affecting the money; though it was at the same time observed, that had arrestments been used in the hands of the debtors, it might, *favore creditorum*, have been sustained, evidence being given that Falconer was but an interposed person. [2]

In a still later case, an arrestment in the hands of a factor or agent, of bills blank indorsed lodged with him, and bills drawn payable to him, in order to receive payment, was found inept (of no effect); [3] but arrestments

[2] 1740, Creditors of Gordon *a.* Innes, Kilkerr. (Arreſtment.) No. 8. p. 30.—Falconer, in whoſe hands the arreſtment was laid, was the original *payee*, and not an indorſee, as Mr Bell, by miſtake, calls him, p. 359. The principle, however, is the ſame.

[3] 1767, Thorold, &c. *a.* Forreſt & Sinclair, Dict. v. 3. p. 41.—Mor. Dec. p. 757. This caſe, as reported in the Faculty Collection, makes no

arrestments used after he had received payment, were sustained. [4]

From what was stated in the case of Creditors of Gordon *a.* Innes, it would appear, that where the peculiar privileges of bills are not in question, an arrestment in the accepter's hands would be good. This seems to be corroborated by a subsequent decision, where, however, there were special circumstances. A debtor having employed to sell goods for him, a person who took from the purchaser a bill for the amount payable to himself, an arrestment was laid in the hands of the holder of the bill, and afterwards an arrestment was used by another party in the hands of the purchaser who had accepted the bill. The last arrestment in the hands of the accepter was preferred. [5] But an arrestment of a bill before payment, and after acceptance, in the hands of a consignee, who had a right to part of the contents of the bill, was of no effect.

no mention of the decision on the point relative to the arrestment of bills. The doctrine it tends to establish is, that the arresters of debts in Scotland, due to an English house, are preferable to the assignees under a commission of bankruptcy in England;—a doctrine, the principle of which was afterwards entirely departed from, particularly in the cases, Rhone *a.* Parish & Schreiber, 6. August 1776; and Reid *a.* Struthers, 1. July 1803. The case of Scott *a.* Small, 1779, mentioned in the Dictionary, does not appear to have been collected.

[4] 1768, Fac. Coll. Pewtress & Roberts *a.* Thorold, &c. Fac. Coll. N° 72. p. 315.—Mor. Dec. p. 757. (*note.*)

[5] 1752, Dunlop *a.* Jap, Fac. Coll. N° 5. p. 7.

MacIntosh of Antigua, remitted to Allans & Gow of Glasgow, to whom he owed 38*l.* 12s., a bill for 200*l.* on Drummond & Co. of London. The bill was enclosed in a letter, which mentioned, that he meant soon to draw on them in favour of his other creditors. The bill was received by Allans & Gow on 2. January, and was payable 10. March 1794. On the 25. February 1794, after the bill had been accepted, an arrestment was used by Pitcairn in the hands of Allans & Gow on a debt due by MacIntosh, which was afterwards acquired by Haddow. MacIntosh, on 30. January 1794, drew a bill on Allans & Gow, in favour of A. Campbell & Co., for 89*l.* 15s., payable 30 days after sight. This bill was protested for non-acceptance on 12. April, and for non-payment on 15. May 1794, before which time the bill on Drummond & Co. was paid. On the 9. December 1794, Haddow executed a second arrestment in his own name. He afterwards insisted in a process of furthcoming,[6] which was conjoined with an action of multiplepoinding[7] at the instance of the arrestees,

A.

[6] A process of furthcoming is an action at the instance of the arrester to make his arrestment effectual, by obtaining delivery, or payment, from the arrestee, of the funds and effects attached in his hands.

[7] A process of multiplepoinding is an action raised at the instance of a person, in whose hands the same funds have been attached by different parties, to have the respective rights of the claimants discussed, and a sanction given to him to pay to whoever is found to have the best right.

A. Campbell & Co. objected to the validity of the original arrestment by Pitcairn, and maintained, that the draft in their favour, with the protest taken on it, after Allans & Gow had received payment of the bill, must be considered as a completed assignation to the fund *in medio* to the extent of the debt: And as the bill was deposited with Allans & Gow, for the purpose of enabling MacIntosh to draw on them in favour of his other creditors, the bill granted to A. Campbell & Co., which was prior in date to the arrestment, was to be considered as an assignation intimated before the former was executed. The Lord Ordinary found the arrestment at Pitcairn's instance, when the arrestee was only in possession of the instruction (voucher) of the debt, was inept; and therefore preferred Campbell & Co. upon the interest produced by them. To which judgment the Court adhered. [8]

There is manifestly, therefore, a considerable discrepancy in the decisions respecting the arrestment of bills. The unreported case of Douglas Heron & Co. *a.* Malcolm, militates against that of Jamieson *a.* Leckie; and the decision in the Creditors of Gordon *a.* Innes, is encountered by those in Thorold & Co. *a.* Forrest & Sinclair, and Haddow *a.* Campbell & Co. From these last cases, it must be inferred, that arrestment

[8] 1796, Haddow *a.* Campbell & Co. Fac. Coll. N° 6. p. 15.

of a bill in the hands of a payee or third party, is ineffectual until the money be paid, and will not exclude the claims and diligence of other creditors. At the same time, it may be deduced from the other decisions, that, by the arrestment of a bill deposited with a third party for behoof of the proprietor, a sufficient *nexus* is imposed as to render it unsafe for the arrestee to part with it until the claims of the arrester be discussed. Were the author disposed to hazard an opinion on the subject, he would be inclined to think with Mr Bell, that there is no obvious reason why a bill may not be attached by an arrestment, so as to secure a preference against all but *onerous* indorsees. But it is well ascertained, that a bill due to the debtor himself, can neither be effectually arrested in his own hands, nor in those of the accepter; and that indorsation will defeat the diligence.[1]

IV. *For what period bills retain their extraordinary privileges.* Before the year 1772, it had not been ascertained how long the privileges of bills endured,

[1] In the case of Smith *a.* Home, Dalrymple, No. 93. p. 130, it was offered to be proved, that an arrestment in the hands of the payee was prior to the indorsement by him; but this was refused, and the indorsation sustained, in respect it was not alleged that it was gratuitous, or that the arrestment was known to the indorser.—See Forbes *g.* Innes, 1739, Home, No. 113. p. 182.—Logan *a.* MacCoull, Dict. v. 1. p. 105.—Neilson *a.* Russell, Dict. vol. 2. p. 218.—And Sinclair *q.* Lochhead, 1798, Fac. Coll. No. 88. p. 208.

dured, so as to entitle the holder to an action upon them against the debtor, or what lapse of time or silence, on the part of the holder, was to be construed into a loss of his right, sufficient to debar him from pursuing. There was, accordingly, a variety of decisions on the point.[2] But to obviate the inconveniences which had been found to result from the not limiting of bills and promissory notes to a moderate endurance, it was enacted by 12. George III. c. 72, that action and diligence on bills and notes should be circumscribed to six years after the terms at which such bills or notes became exigible. And bills now retain their extraordinary privileges during that period.[3]

[2] See 1766, Wemyss *a.* MacNaughton, Fac. Coll. No. 37. p. 62.—1767, Maxwell *a.* Maxwell, *ibid.* No. 52. p. 92.—1767, Colquhoun *a.* Duke of Argyle, *ibid.* No. 53. p. 93.—1768, Ker *a.* Ker, *ibid.* No. 77. p. 323.

[3] 1787, Robertson *a.* MacGlashan, Dict. v. 3. p. 91.

CHAP. X.

OF THE ACTION AND DILIGENCE ON BILLS.

THE general adoption of bills, in all mercantile and money transactions, has proceeded not only from their being susceptible of a rapid circulation by means of indorsement, and from their affording a greater security to the holder, by being exempted from the exceptions pleadable against other writs, but from their possessing, at the same time, all the privileges of bonds, in the ease and expedition with which the debt may be recovered from the debtor, without the formality and delay of an action at law. On common debts, diligence against the person or estate of the debtor can only proceed in consequence of the judgment of a court. But in bonds, or other deeds for the payment of

of money, a clause is generally introduced, by which the parties dispense with the necessity of an action, and consent that the deed shall be recorded in the books of a court having a competent jurisdiction, and that execution may pass summarily thereupon. In the event of the debtor refusing or delaying to pay, the possessor of the deed has only to give it in to the clerk of court, who enters it among the records, and delivers an extract or authentic copy of it accompanied with a decree upon which the debtor may be summarily charged. No clause of registration could possibly enter into bills, being incompatible with their nature; but the privilege of summary execution was conferred on them about the end of the seventeenth century, by act 1681, 20th Parl. Charles II., which is as follows. 'Our Sovereign Lord, considering how necessary it is for the flourishing of trade, that bills or letters of exchange be duly paid, and have ready execution, conform to the custom of other parts, doth, therefore, with advice and consent of his estates of parliament, statute and ordain, That foreign bills of exchange from or to this realm, duly protested for not-acceptance or for not-payment, the said protest having the bill of exchange prefixed, is registrable within six months after the date of the said bill in case of non-acceptance, or after the falling due thereof in case of non-payment, in the books of Council and Session, or other competent judicatures, at the instance

stance of the person to whom the same is made payable, or his order, either against the drawer or indorser, in case of a protest for not-acceptance, or against the acceptor, in case of a protest for not-payment, to the effect it may have the authority of the judges thereof interposed thereto, that letters of horning, upon a charge of six days, and other executorials necessary, may pass thereupon for the whole sums contained in the bill, as well exchange as principal, in form as effeirs; sicklike, and in the same manner as upon registrate bonds or decrees of registration proceeding upon consent of parties: Providing always, that, if the saids protests be not duly registrate within six months, in manner above provided, then, and in that case, the saids bills and protests are not to have summar execution, but only to be pursued by way of ordinary action as accords. And further, the sums in all bills of exchange bear annual-rent, in case of not-acceptance and not-payment, from the day of their falling due, ay and while the payment thereof. And further, notwithstanding of the foresaid summar execution provided to follow upon bills of exchange for the sums therein contained, in manner above specified, yet it is leasom to the party charger to pursue for the exchange if not contained in the saids bills, with re-exchange, damage, interest, and all expenses, before the ordinary judge; or, in case of suspension, to eik the same to the charge, at the discussing of the said

said suspension, to the effect that the same may be liquidated, and decree given therefore, either against the party principal, or against him and his cautioners as accords.'

This statute is made applicable to inland bills by act 1696. c. 36. which statutes, enacts and declares, 'That the same execution shall be competent and proceed upon inland bills and precepts, as is provided to pass upon foreign bills of exchange by the twentieth parliament of King Charles the Second, holden *in anno* 1681, which act is hereby extended to inland bills and precepts in all points.'

The protest of an accepted bill, therefore, may at once be recorded in the books of Council and Session, or in those of any other court within the jurisdiction of which the debtor lives, and a decree is immediately issued, upon which a charge of payment of six days is given, at the expiry of which, if payment be not made, diligence may proceed on the same warrant to secure his property or person. In the case of non-acceptance, execution may pass at the suit of the holder, against the drawer or indorsers.[x] This summary recourse against the drawer and indorsers, even before the term of payment, if the drawee refuses to accept, seems to have been given, because

[x] 1795, Cowan *a.* Key. Dict. v. 3. p. 84.

because the creditor in a bill frequently consents to a distant term of payment, in consideration of the additional security he is to acquire by the acceptance and responsibility of the drawee; and when disappointed in this respect, it would be hard were he obliged to wait the long term of payment to which he consented merely in the view of obtaining that security.[a] But after the bill was accepted, the statute 1681 authorised no summary diligence against any other than the accepter; and in the event of his failure, the holder could only proceed by way of ordinary action against the drawer and indorsers. To remedy this, it is enacted, by 12. George III. c. 72. § 42, 'That from and after the 15th day of May 1772, summary execution by horning or other diligence, shall pass upon bills, whether foreign or inland, and whether accepted or protested, for non-acceptance, and upon all promissory notes duly negotiated, not only against the accepters of such bills, or grantors of such notes, but also against the drawers of such bills and the whole indorsers of the said bills and notes, jointly and severally, except where the indorsation is qualified to be without recourse, saving and reserving to the drawers or indorsers their respective claims of recourse against each other, and all defences against

[a] Erſk. 3. 2. 36.

gainst the same, according to law.' And by the same act it is appointed, § 41., 'That all inland bills and promissory notes shall be protested in like manner as foreign bills, before the expiration of the three days of grace, otherwise there shall be no recourse against the drawers or indorsers of such inland bills, or against the indorsers of such promissory notes; and it shall be sufficient to preserve the said recourse, if notice is given of the dishonour within fourteen days after the protest is taken, without prejudice to the notification of the dishonour of foreign bills, to be made within such time as is required by the usage and custom of merchants.'

It is only the principal sum in the bill, with the interest, that can be charged for summarily. The exchange, when it is not included in the bill, the reexchange incurred by suffering the bill to be protested and returned, and the expense of diligence, must be recovered by an ordinary action; because these not being liquid debts, must be previously constituted by the sentence of a judge, that the amount may be legally ascertained;[3] but, in a suspension, they may be eiked or added to the charge, and decerned for at the discussion of the suspension. Exchange and interest are always due for non-payment. Reexchange is due if the holder is obliged to raise money by redrawing

[3] Forbes, p. 197.

drawing bills in the place of the first draft, for which he pays a higher exchange.[4] Damage, which is likewise only due when incurred, is the commission-money paid for procuring the new bill, expense of protesting the old, and postages. But reexchange is by no means double exchange; it is only the difference between the exchange paid for the first bill, and that paid for the second.[5] The holder cannot claim damage sustained on account of his being disappointed in his projects through not-payment, or the loss of some favourable opportunity of making profit by the money.[6] And, according to the French Ordonnance of 1673, reexchange cannot be demanded, unless it be shown by an instrument, that the holder of the protested bill took up money by exchange at the place where it should have been paid.[7] When a bill, too, has been transmitted

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4 Sav. tom. 1. liv. 3. ch. 11.—Poth. n. 64. Reexchange and damages on a dishonoured bill from Jamaica is 8 *per cent.*, besides all expenses; on a bill from the Leeward Islands 10 *per cent.*; and from Demerara and Berbice 25 *per cent.* Reexchange from London is $1\frac{1}{4}$ *per cent.*, and $\frac{1}{2}$ *per cent.* commission, besides other charges.

5 Forbes, p. 198.—Poth. n. 64.—Ord. de Com. tit. 6. art. 7.

6 Scarlet, c. 21. R. 16.—Poth. n. 63.—Forbes, p. 197. 'Si mercator probat se debitam pecuniam per solvisset dicta die, certe lucratus esset decem, audiatur; verum si dicat ex illis pecunlis merces comparasset lucratusque esset, non audiatur'—according to Straccha, quoted by the last.

7 Sav. tom. 1. liv. 3. ch. 11.—Ord. tit. 6. art. 7.

transmitted by indorsation, and negotiated in different places, the drawer is only liable for reexchange to the place from whence the remittance was made; and the holder must operate his relief against the indorsers, and the indorsers against each other, for payment of the reexchange between the places where it was negotiated by them.[6] But if, by the drawer's order or permission, the bill was transmitted through different places, or if he gave indefinite powers to negotiate, he will be liable for reexchange to these places.[7] In England, the drawer of a bill was found liable for the whole amount of the reexchange, occasioned by the circuitous mode of returning the bill through the various countries in which it had been negotiated, as much as for that occasioned by a direct return, although payment of the bill was expressly prohibited by the laws of the country on which it was drawn.[8] The principle seems to be, that the drawer is in all cases liable for the damage and expense occasioned by the dishonour of the bill, as he ought not to have drawn it if he were not sure of its being accepted and retired. At any rate, he is bound to indemnify the payee, from whom he received value, of all loss to which the former

[6] Boucher, n. 1062.—Sav. tom. 1. ch. 11.—Poth. n. 67.

[7] Ord. de Com. art. 6. tit. 6.—Sav. *ibid.* p. 206.

[8] Chitty, p. 216.—Kyd, p. 140, 141.

former may have been subjected by the refusal and return of the bill. But where that loss has been occasioned by a fortuitous event, such as occurred in the English case just cited, there certainly is a degree of hardship in making the drawer responsible for an extraordinary expense which he could neither foresee nor prevent. At the same time, there is a difficulty, and perhaps an equal or greater hardship, in fixing it on any of the other parties, unless the bill has, for some particular purpose, been negotiated by them out of the usual and ordinary channel; in which case the drawer ought only to be liable for what would have been the reexchange on a direct return of the bill, and the indorsers liable to each other for the difference.

By the act 1681, bills are declared to bear interest by law from their date, if not accepted; and from the term of payment, if accepted and not paid. The payee is supposed to have given value to the drawer at the time the bill was drawn; and therefore, if it be not accepted, he is entitled to interest from its date. But where it is accepted, and not paid, he can only claim interest from the period of payment to which he consented, in case acceptance was obtained. Hence the distinction of the act. As, by this statute, a protest is necessary for procuring diligence, it might be inferred that it is also necessary to give a right to interest. In the case of non-acceptance, a protest is required, to ascertain that the bill

was presented and refused; and for the same reason, a protest for non-payment is requisite, to shew that a demand of payment was made. Properly, therefore, interest should only be due on bills that are strictly negotiated, as the protest is the legal evidence of the demand. This, accordingly, appears to be the law of England,[1] and other countries.[2] However, it has been decided, that a foreign bill of exchange bears interest against the accepter from the term of payment, although not protested for non-payment.[3] And where a bill was drawn, payable to the drawer three days after sight, and no demand made upon it for several years, the Court found interest to be due on the bill after the three days, as, in the circumstances of the case, it was construed to be drawn three days after date.[4] A bill, payable to the drawer at sight, the acceptance of which was not dated, was found

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[1] 9. & 10. Will. III. c. 17. § 2.—3. & 4. Anne, c. 9.—Chitty, p. 214.—Kyd, p. 144. It must be confessed, that, in both countries, the law is rather obscure on the subject.

[2] In France, interest is only due from the date of the protest. 'L'interet du principal et du change sera dû du jour du protêt.' Ord. de Com. tit. 6. art. 7.

[3] 1718, Baynton & Shaw *a.* Swinton, R. Dec. v. 1. N° 15. p. 30.

[4] 1740, Tarras *a.* Innes, Home, N° 141. p. 241.

found to bear interest from the date of the bill.[5] Lord Kilkerran remarks, on this case, that it is an usual thing to draw bills payable at sight to a third party, in the same or a distant country; and the sight or acceptance is the term of payment; but it is an improper style, where the bill is drawn payable to the drawer, especially (which probably was the case here) where the parties are together at the time: yet when the bill is so drawn, the words *at sight*, cannot have a different signification from what they have upon other occasions; and therefore, the acceptance is the term of payment, and there is no need of any other demand.

Bills and promissory notes, payable on demand, can only bear interest from the date of the protest, if protested; or the date of citation, if an action has been brought upon them.[6] No interest is due on a bill accepted by a wife, though for the price of articles which fall within her *præpositura*,[7] as no married woman can grant securities bearing interest.[8]

[5] 1748, Kinloch *a.* Mercers, Kilker. (B. of Exch.) N° 18. p. 83.

[6] 1751, Moncrieff *a.* Moncrieff, Falconer, v. 2. N°248. p. 303.

[7] Forrest *a.* Earl of Sutherland.

[8] Chap. 2. p. 55.

Horning may be taken out at the instance of the holder against the drawer and all the indorsers at the same time; for, so far as regards the holder, they are all drawers, and it would be very inconvenient were they to be discussed separately, especially in foreign bills, where it might be on the faith of one of the intermediate indorsers only that the holder had given value for the bill.[9] And although the protest be in the name of an indorsee, the indorser or drawer who has paid, may proceed with summary diligence in his own name;[1] in which case, it is usual and necessary to take a receipt upon the bill or protest, to show that the contents were paid by him in whose name the diligence is to proceed.[2] But, according to the act before recited, 12. George III., diligence cannot proceed by horning against the drawer and indorsers, unless the bill be duly negotiated and protested within the three days of grace; for no summary execution is

[9] 1747, A. *a.* B. Kilker. (B. of Exch.) N° 13. p. 78.—Poth. n. 160.

[1] 1745, Heries, Falconer's Dec. v. 1. p. 39.

[2] By 12. Geo. III. c. 72. § 43. it is provided, 'That from and after the said 15th day of May 1772, summary execution by horning or other diligence, shall be competent to the indorsee of a bill, although the protest is not in the name of the indorsee craving the diligence; and although the bill is not reconveyed to him by indorsation, if he produces a receipt for the value, by act of honour, or a missive letter from the protesting indorsee, mentioning the dishonour, agreeable to the practice of merchants in returned bills.'

is authorised by this act, if a protest has not been regularly taken within these days. [3] If a bill is protested for non-acceptance, it must be registered within six months of the date of the bill, and, if protested for non-payment, the protest and registration must be within six months of the day on which the bill fell due. [4] The construction of this part of the act, in practice, is, that the bill and protest must be registered within six months of the precise day of payment, and not within six months of the last day of grace. It was found in 1762, Scougal *a.* Ker, where a bill had lain over twenty months without any diligence done on it, that the privilege of summary execution, and of barring compensation, were upon the same footing, so as that both should be lost together. [5] But the law in this respect is now altered; and though bills cannot be the foundation of summary diligence, unless protested and registered within six months from their date, if not accepted,—and from the day they are due, if protested for non-payment,—they retain their extraordinary privileges, in other respects, for six years. [6]

Horning cannot proceed on a bill wanting the

 drawer's

[3] 1775, Elliot *a.* Richmond, Fac. Coll. N° 196. p. 132.

[4] 1699, Yuille *a.* Richardſon, Fountainhall, 2. 64.

[5] Kam. Sel. Dec. 190, 254.

[6] 1787, Robertſon *a.* MacGlaſhan.

drawer's subscription; for although the bill, being holograph of the drawer, might be valid without his subscription, yet it would require a proof of its being holograph; and no horning can proceed but upon writs *ex facie* valid.[7] A bill being indorsed to a merchant in London, 'for value in account,' was protested in his name for non-payment, and returned to the indorser, who charged the acceptor with horning, and executed a poinding, after receiving advice that the indorsee had died at London some days before the date of the charge. 'The Lords reduced the poinding,' though it was pleaded, that in the case of indorsations for value in account, the substantial interest remains in the indorser.[8]

Where an accepted bill has been neglected to be protested and registered within the six months, it can only be pursued for by an ordinary action, like any other voucher of debt. And where a bill has, by any accident, been lost or destroyed, an action for proving its tenor is competent to the owner against the

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[7] 1750, A. *a.* B. Dict. v. 3. p. 76.

[8] 1766, Stewart *a.* Foggo, Fac. Coll. 48. p. 277.—The Court, in this case, repelled the plea of retention argued for the poinder, upon the authority of the decisions,—1707, Lees *a.* Dinwoodie, Fountainhall, v. 2. p. 402.—and 1745, Creditors of Glendinning *a.* Montgomery, Kilkerran, (Arrestment) No. 16. p. 44. In these cases there was a *bona fides* which did not occur in this case.

the other parties liable, in which he must condescend on a special *casus amissionis*.[9]

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[9] 1780, Campbell *a*. Creditors of York Buildings Company, Fac. Coll. No. 106. p. 200.—A perſon having granted a bill to another for goods to be delivered to the accepter, brought, after ſome years, an action to have the bill returned, the goods not having been delivered. A parole proof of this was allowed by an inferior court; in conſidering which, the bill was ordered to be returned. The holder ſuſpended, but did not intimate the ſuſpenſion till nine years thereafter; when, at the ſame time, he charged the accepter on a horning to pay the bill; and afterwards, during the dependence of the ſuſpenſion, compelled payment by caption. He was found liable in damages and expences.—1755, Ogilvie *a*. Robertſon, Fac. Coll. No. 151. p. 225.

CHAP. XI.

OF THE PRESCRIPTION OF BILLS.

MANY disputes and difficulties were found to result from there being no limited period within which actions upon bills should be brought, and no ascertained space during which they should retain their force and efficacy as privileged documents. It was, therefore, by the 12. Geo. III. c. 72. (rendered perpetual by 23. Geo. III. c. 18. § 55.) enacted, § 37. 'That no bill of exchange, or inland bill or promissory note, executed after the 15th day of May 1772, shall be of force, or effectual to produce any diligence or action, in that part of Great Britain called Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said

said bills or notes became exigible.' The same statute enacts, § 38., 'That no bill of exchange, or inland bill or promissory note, which has been or shall be granted, before the said 15th day of May 1772, shall be of force, or effectual to produce any diligence or action, unless such diligence has been or shall be raised, or action has or shall be commenced thereon, before the expiration of six years from and after the said 15th day of May 1772.'

And by § 39. it is provided, 'That no notes, commonly called bank-notes, or post-bills, issued or to be issued by any bank or banking company, and which contain an obligation of payment to the bearer, and are circulated as money, shall be comprehended under the aforesaid limitation or prescription; and that it shall and may be lawful and competent, at any time after the expiration of the said six years, in either of the cases before mentioned, to prove the debts contained in the said bills and promissory notes, and that the same are resting owing, by the oath or writ of the debtor.'

As the action or diligence upon bills and notes, must be raised within six years after the terms at which the sums therein contained become exigible, it has been decided, that the sexennial prescription runs, not from the precise day of payment, but from the last day of grace, as the contents of a bill or note are not exigible

exigible till then;[1] and where a bill was dated prior to the 15th May 1772, but not payable till after that day, it was found sufficient that action was commenced within six years from the term of payment, as the case had not been provided for by the statute.[2]

To interrupt and preclude prescription, summary diligence in the form pointed out in the preceding chapter, must be executed against the parties to the bill; or, where that is omitted to be done within the time required by the statutes, an ordinary action, founding on the bill as a document of debt, must be brought within the six years, in terms of the act above recited. By either of these modes, the debt may be constituted against the debtor, so as to bar the limitation, and entitle the creditor to recover at any time within forty years, the period of the long prescription. The diligence necessary for this purpose must be complete, and the action regular and formal. The mere act of protesting the bill, or even registering the protest, is not sufficient:[3] a charge of payment must be given. Neither will the sexennial limitation be affected by an informal summons, such as where the

[1] 1793, Douglas Heron & Co. *a.* Truſtees of Grant, Dict. v. 4. p. 103.—Affirmed on appeal, 11th Nov. 1796.

[2] 1782, Tweedie, &c. *a.* Gibſon, Fac. Coll. No. 42. p. 69.

[3] 1784, Douglas Heron & Co. *a.* Richardſon, *Ibid.* No. 179. p. 282.

the officer's execution is not authenticated in the usual manner by subscribing witnesses:[4] Nor will it be so by the execution of a blank admiral precept, in which, according to its form, no mention is made of any particular debt; but a decree taken against one of the co-obligants in a bill before the lapse of the six years, was deemed sufficient to interrupt prescription as to all the other obligants.[5] It was also held to be a sufficient interruption, that certain bills and protests had been produced by the holders within the statutory period, in a process of ranking and sale of the debtor's estate.[6]

In the long prescription of deeds, any act of acknowledgement of the debtor, will interrupt the currency of prescription; but the short prescriptions, it is said, being grounded on a presumption that the whole debt was paid within the years of prescription, can only be interrupted by a writing which proves resting owing, and constitutes in itself a valid document of debt. Hence, partial payments have not the effect;[7] and hence a decree of constitution obtained by the debtor in a bill, within six years from the date, against a person bound to relieve him, was found not to interrupt prescription

[4] 1790, Baillie *a.* Doig, Dict. v. 4. p. 114.

[5] 1784, Gordon *a.* Bogle, *Ibid.* p. 104.

[6] Douglas Heron & Co. *a.* Richardson.

[7] Erſk. b. 3. t. 7. § 39.

prescription in favour of the creditor in the bill, although the latter had been examined on the verity of his debt in the process of constitution, and had upon that occasion produced his bill. [8]

It was remarked from the Bench, in the discussion of this cause, that an indefinite partial payment, within the six years, may not have the effect to interrupt prescription; because it affords no evidence that the rest of the debt was then due, as it might have been extinguished by compensation or otherwise. But a payment of the interest, during the currency of the six years, will interrupt the prescription, as affording evidence that the whole principal sum of the debt was then due. If, for example, such payment of interest should take place only a day or two before the lapse of the six years, the act certainly would not apply, as the Legislature could not have meant to introduce a prescription of a week or a day.

The yearly payment of the legal interest of a specific sum, assuredly implies that the principal is unpaid, and is a clear acknowledgment of debt at the date of the last receipt for the interest; but, by the same rule, a partial payment, under certain circumstances, as strongly implies that the remainder of the principal sum was due, and acknowledged to be so, at the date of the

[8] 1795, Viſcount Arbuthnot *a.* Douglas, Fac. Coll. No. 164. p. 377.

the payment. If a bill, for instance, be granted for 100*l.*, and the holder marks on the back of it, 'Received in part of the within sum 50*l.*' the only inference that can be drawn from this, as long as the bill remains unretired in his hands, is, that the balance was unpaid at the time the partial payment was made. It would appear, therefore, that a definite partial payment, and a payment of interest, ought to be governed by similar principles as to the weight given to them in estimating how far they are to be admitted as an acknowledgment and evidence of a subsisting debt.

Bills after prescription may be proved by the oath or writ of the debtor; but it is not specified what kind of writ, on the part of the debtor, will amount to a sufficient proof of the debt, nor does it seem to be yet very well ascertained.

In the case, Buchan *a.* Barclay, it was decided, that prescription was not obviated by a relative writing of the debtor of equal date with the bill itself;[9] but, in a subsequent case, action was sustained for a debt vouched by a docqueted account and a bill, both of the same date, after the latter was prescribed.

Patrick and Alexander Campbell were engaged in various joint concerns. On the 15th May 1782 they settled

[9] 1787, Dict. v. 4. p. 103.

settled accounts; and a balance of 490*l.* was found to be due by Alexander, for which he then granted bill to Patrick, payable three days after date. To the account thus settled the parties at the same time subjoined the following docquet. '15th March 1782. This account, containing an abstract of the accounts paid and settled of this date, being examined by the said Alexander Campbell and Patrick Campbell, it is found and declared that a balance of 490*l.* Sterling arises to the said Patrick Campbell, for which the said Alexander Campbell has now granted his acceptance, payable three days after date, and which, when paid, is in full of the above.' Alexander Campbell died a few months after the date of this transaction. In 1793 Patrick Campbell brought an action against his trustees for payment of the debt contained in the docqueted account and bill. The Court repelled the plea of prescription set up by the defenders to the sum of 490*l.* as the balance found and ascertained by the docqueted account pursued on.[1]

A partial payment, made after the sexennial period by the accepter's heir, and marked by him on the back of the bill, was found to bar him from afterwards pleading prescription;[2] and the defence of prescription

[1] 1797, Campbell *a.* Campbell, &c. Fac. Coll. No. 24. p. 59.—See Howison *a.* Howison, 1784, *ibid.* No. 181. p. 285.

[2] 1784, Scot *a.* Gray, *ibid.* No. 139. p. 218.

tion is in the same manner precluded by writings after the six years, when they amount to an admission of a subsisting debt.

Fairie, on the 8th May 1782, granted to the mother of Russel a bill of exchange for 92*l.* payable one year after date. On the bill were marked a variety of partial payments, the latest dated in September 1788. Three of the markings were in Fairie's handwriting; the last of these, however, was in 1786. After Mrs Russel's death, there having been many transactions between her and Fairie, a correspondence took place between her son and him. In March 1789, Fairie desired Russel 'to send a copy of the bill, and the payments made on the back of it, so that he might settle the balance.' And in July 1789, after the expiration of the six years, he again wrote in similar terms. At last, an action was brought by Russel against Fairie for the sum appearing to be due, after deduction of the partial payments as marked on the bill. The defender alleged that he had made other advances to the full amount, trusting that the creditor would have carefully noted them. At any rate, he contended that the bill was no longer a probative document, being cut off by the sexennial limitation. The Lord Ordinary pronounced an interlocutor finding, that in respect it had been decided by the Court that receipts for partial payments within the six years, do not bar the sexennial prescription of bills, when

pleaded

pleaded against an action brought on the bill after the lapse of the said six years; and also in respect that the defender's missive letters produced by the pursuer in this action founded on the bill libelled, do not, in terms of the statute, prove the debt as libelled, or that the same is resting owing: therefore absolved the defender, and dismissed the action. A representation for the pursuer was given in, which was followed with answers. A majority of the Court were of opinion, that the enactment of 1772 was of a similar nature with those introducing the shorter prescriptions of Scotland, and not an adoption of the English law with regard to the limitation of bills, &c.; and that neither the markings in the handwriting of the defender, nor the relative correspondence within the six years, could save from the currency of prescription. But it was ultimately found, that the letter in process, dated 22d July 1789, from the defender to the pursuer, after the sexennial prescription had run, did instruct that the debt was then resting owing in part; and, therefore, repelled the defence of prescription. [3]

A doubt was stated by one of the judges, whether an interruption of the sexennial prescription by writing was to be considered as a renewal of the voucher,

[3] 1792, Ruffel *a.* Fairie, Fac. Coll. No. 211. p. 444.

so as to make room for a new course of prescription, to be reckoned from the date of the interruption, as was found in the case of the septennial limitation of cautionary engagements; [4] or whether, the operation of the statute being thus completely done away, the bill would subsist as a legal instrument for 40 years, unless, from the circumstances of the case, there arose a presumption of payment. But it was not necessary to determine the point.

Prescription was also considered to be barred by a writing signed by the accepter of a bill, importing an acknowledgment of the debt on the last day of the six years. In this case, it was thought that the subscription of the writing, the very day before the prescription had run, was a circumstance that afforded satisfactory evidence that the bill was not paid within the six years; [5] and in the debate that took place on the Bench, there was a pretty full discussion of the doubt stated in the case of Russel *a.* Fairie, concerning the effect of a writing in interrupting the prescription of bills. The opinions delivered by seven of the judges, including the Lord President, attributed the same effect to an acknowledgment of resting owing

[4] 1715, Gordon *a.* Campbell. Dict. 2. p. 116.

[5] 1797, Executors of Lindsay *a.* Moffats. Fac. Coll. No. 23. p. 56.

owing made at any time within the six years, as to one made after the expiration thereof. A distinction, it was observed, ought to be carefully taken between a bill and the debt created by it. The statute cuts off the bill in six years; but the Legislature by doing so, did not mean to annihilate the debt at the close of that period. Its existence after the six years falls in every case to be determined by the common rules of law. A clear acknowledgment of resting owing after the term of payment of the bill, and within the six years, certainly proves the debt to be then due, and of course forms a new *terminus* from which prescription must commence. To give no effect to an acknowledgment of resting owing within the six years, in any case, where there is a possibility of the bill being paid before their completion, would be to introduce an indefinite and arbitrary course of prescription unwarranted by the statute, the length of which would depend entirely on the time which was to run between the date of the acknowledgement, and the expiration of the six years, which might be only a year, a month, a week, or a day, according to circumstances.

Other seven of the judges held a different opinion. They thought the statute rested on a presumption of payment; and that, therefore, no acknowledgment within the six years, which did not wholly elide that presumption, could bar the statute.

It would appear, then, from the opinions delivered on the Bench in the above case, to be still uncertain, whether an acknowledgment of the debt in the bill within the six years will prevent prescription or not. It is universally admitted, that prescription is precluded by any writing of the debtor subsequent to the six years, which proves the debt to be then resting owing. But the question is, if there be sufficient reason for denying effect to a writing within the six years, while one after that period is received as effectual. The preamble of this part of the statute bears, That it was enacted to remedy the great inconveniences that have been found, from experience, to arise from bills not being limited to a moderate endurance; and it proceeds to provide, 'That no bill or promissory note shall be of force, or effectual to produce any diligence or action, unless such diligence shall be raised, or action commenced within six years from the terms at which the sums in the said bills or notes became exigible;' and 'that it shall and may be lawful and competent, at any time after the expiration of the said six years, to prove the debts contained in the said bills and promissory notes, and that the same are resting owing, by the oath or writ of the debtor.'[6]

After

[6] This part of the act is far from being clear, and certainly does not express what writs are to be received as evidence of the existence of the debt. If no bill is effectual to produce an action, unless such action be

After the six years, then, it should seem, that the subsistence of the debt may be proved by the oath or writ of the debtor. But no written acknowledgment, it is said, which is given within the six years, can be admitted as evidence; because the law presumes, that payment must have been made subsequent to such acknowledgment, and before the expiration of the six years. The words of the statute, however, do not seem to sanction this presumption. On the contrary, an action is competent on the bill after the expiry of the six years, in which the creditor is entitled to prove the existence of the debt by the debtor's writ or oath. In a common action of debt, the Court must judge by the ordinary rules, whether such proof has been adduced as satisfactorily establishes that the debt is, or is not, resting owing; and for that purpose must take into consideration writs granted before the six years, as well as those granted after. The act does not say, that no relative writ within the six years is to be received as evidence of the debt being resting owing at the expiry of that time; and it is but reasonable to admit such writ to prove that the debt ex-

be commenced within six years, it might be maintained, that no prescribed bill could be a proper ground of action at all. But this is evidently a quibble; for, without an action, it would be impossible to prove the debt to be resting owing. It is unfortunate, however, that the words of the statute are not more precise and explicit on a point which is undoubtedly of high importance.

isted at the date of the writ. The presumption of payment afterwards is always opposed by a contrary presumption. When the debt in a bill is paid, the document is usually delivered up to the debtor; from which the general presumption arises, that as long as it remains with the creditor unretired, the debt is due. The statute, to obviate the inconveniences produced by bills being kept too long up without a demand being made, limits this presumption of common law to six years; but it still reserves to the creditor the power of proving, after the six years, by the debtor's writ or oath, that the debt was not extinguished. The statute, therefore, does not rest on a presumption of payment, but merely limits, in the case of bills, to six years, the doctrine and presumption, that these documents, when unretired, are unpaid. Where the debt, therefore, is proved, by a writing granted within the six years, to have existed at the date of that writing, the limitation of the statute, of the presumption with regard to unretired documents, ought to run, not from the original date of the bill, but from the date of the writing by which the debt was shown and ascertained to be subsisting. If the presumption of payment within the six years is, in all cases, to be taken as a rule, no written acknowledgement of resting owing granted after that period ought to have the power of reviving the bill, however good such acknowledgment might be as a voucher of debt

debt by itself: or if it have such power, it is not very apparent why a writ of the same nature, within the sexennial period, should not have a similar effect. If a writ granted ten years after the date of the bill, does away the presumption of the first six years, and resuscitates the debt in the bill, so as to make it run a new course of prescription from the date of the writ, it would be somewhat inconsistent to deny any effect whatever to a writ granted five years from the date of the bill, merely on the presumption, that payment was made within the subsequent year. This presumption, as has been already observed, the act does not appear to warrant. The longer the space is that has elapsed from the original constitution of the debt, the stronger is the presumption of payment; and if prescription is to be obviated by a written acknowledgment after the six years, it might be fairly argued, that *a fortiori* ought it to be so by one granted within a shorter period; and a new course of prescription may be admitted in the one case, as well as in the other. Besides, it has been found in the septennial prescription of cautionary obligations, that a promise contained in the cautioner's missive letter, within the seven years, was sufficient to interrupt prescription, so as to make it run a new course from the date of the letter; the letter being held as a new cautionary obligation. [7]

[7] Gordon *a.* Campbell, Dict. 2. 116.

And the same doctrine, when applied to bills, would be no infringement of the law with regard to short prescriptions. [8]

As bills payable at sight are not exigible till presented, prescription of them must run from the day they were presented.

The right of action by an accepter who has paid the contents of a bill without having funds in his hands, against the drawer for repayment, is not affected by the sexennial limitation, seeing that the debt in the bill is discharged by the payment, and the drawer is merely creditor to the accepter for the sum that the latter

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[8] Bills of exchange and promissory notes in England fall under the statute of limitation of 21. James I. c. 16.—Any acknowledgement of the debt, however, or partial payment, or verbal promise made within the six years, bars the limitation. 2. Blackstone's Reports 703.—Douglas's Rep. 652. Whitecomb *v.* Whiting.—Couper's Rep. 189. Hawkins *v.* Saunders.—Blackstone's Com. b. 3. c. 9.—Kyd, p. 200.—Manning, p. 52.—MacDoual's Inst. b. 2. tit. 12.—See also 1755, Creditors of Renton *a.* Baillie. Sel. Dec. No. 85. p. 113.—A bill or note, if above six years standing, will support, or may be proved under, a commission of bankruptcy; for the debt still exists, and no one but the holder can avail himself of the statute of limitations: but where the bankrupt himself applied to set aside the commission, on the ground, that the petitioning creditor's debt was discharged by the statute of limitations, it was accordingly superseded. Chitty, p. 228.—In France, bills run a prescription of five years from the time they fall due, if not protested: or, if protested, from the date of the protest; or if any other demand or suit has taken place, from the date of the last demand or suit.—Ord. 1763, tit. 5. art. 21.—Poth. n. 197.—In Holland, bills prescribe in eight years.

latter has disbursed on his account;[1] and the same rule applies to the action of the drawer against the accepter, who, with effects in his hands, has allowed the bill to be protested and returned.[2]

Prescription runs regularly against minors as well as others, unless they be specially exempted by statute; and, in Scotland, minors are secured in this way from the effect of most of the prescriptions: for, during the years of minority, they are supposed incapable of managing or looking after their affairs; and it would be unjust to subject them to the operation of any law by which their rights might be affected, as long as this incapacity subsists. It is therefore enacted, by § 40. of the foregoing statute, 'that the years of the minority of the creditors in such bills or notes, shall not be computed in the said six years.'—In England, it is provided that the limitation of six years shall not run against minors and *femmes couverts*, or where the person entitled to bring the action, or against whom the claim lies, is beyond seas.[3]—In France, where bills prescribe in five years, prescription is not interrupted by minority, or any privilege

[1] 1792, Ralston *a.* Lamont, Fac. Coll. N° 111. p. 443. Poth. n. 198.

[2] Poth. n. 199.—Sav. Parere 72.

[3] 21. James I. c. 16. § 7.—5. Annæ, c. 16.

privilege whatever,[4] though, for this, no adequate reason seems to be assigned.

After prescription, no summary diligence can proceed on a bill, though the debtor's oath should have proved the debt. The debt may be thus revived; but the document remains prescribed, at least its extraordinary privileges cease.[5] And it has been decided, that, even without the debtor's oath, an onerous indorsee is entitled to demand payment of a prescribed bill, although it was accepted solely for the accommodation of the drawer, the accepter's subscription not being denied, nor payment alleged.[6]

CHAP.

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[4] Ord. de Com. tit. 5. art. 21, 22.—Sav. tom. 1. ch. 6. Poth. n. 206.

[5] 1804, Armstrong *a.* Johnstone, Fac. Coll. N° 158. p. 357.

[6] 1800, Philp *a.* Milne, *ibid.* No. 155. p. 349. This case must have been decided on a specialty. Had the debtor, when the action was brought, simply pleaded prescription, without entering into any detail about the cause of granting the bill, he certainly would have been entitled to the benefit of the statute.

CHAP. XII.

OF BILLS IN RELATION TO BANKRUPTCY.

It is an object of considerable importance to inquire into the manner in which bills are affected by bankruptcy, and to ascertain how far, from the legal disability thereby created, the debtor is debarred from making any transfer of his property by drafts or indorsations, and his creditors are entitled to challenge such transactions. The respective claims, too, of bankrupt estates on each other through the medium of bills, which are often exceedingly intricate, and of difficult adjustment, well demand our attention. The subject of this chapter, therefore, may be divided into two parts. 1*st*, Whether, after bankruptcy, bills can be effectually drawn, accepted or indorsed by

by the bankrupt, or paid by him. And, *2dly*, Upon what principles the claims of ranking and cross ranking for indorsed bills by bankrupt estates upon each other, are to be, or have by the Supreme Court been regulated. Under which divisions may be discussed, at the same time, any collateral points connected with, or bearing in any material respect on, these branches of the subject.

I. Bankruptcy is an open and public declaration of failure; and, in Scotland, it is assumed as a fair presumption, that for sixty days before notorious bankruptcy, the debtor must have had his failure in contemplation. Upon this ground, therefore, the bankruptcy is held to have begun at that period, to the effect of entitling the creditors to challenge all voluntary securities, and to level all preferences constituted within that space of time.[1] To prevent, as far as possible, fraudulent embezzlement and alienation by the bankrupt of his property, by collusive deeds, laws have been enacted against gratuitous conveyances and fictitious debts;[2] and with the view of obviating those unfair preferences, which a person, whose

[1] Bell's Com. 1. p. 4. & 6.

[2] Act 1621, c. 18.—See Bell's Commentaries on the municipal and mercantile law of Scotland, considered in relation to the subject of bankruptcy;—a work of extensive information, and unquestionable utility.

whose circumstances are involved, is apt, from partiality, or the dread of diligence, to communicate to particular creditors, the statute 1696, c. 5, after describing the particulars that constitute bankruptcy, declares, that 'all and whatsoever voluntary dispositions, assignations or other deeds, which shall be found to be made and granted, directly or indirectly, by the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favours of his creditors, either for his (their) satisfaction or further security, in preference to other creditors, to be void and null.'

This statute is confined to deeds granted in satisfaction or security of former debts. It does not therefore apply to new transactions: for a person with whom the debtor enters into a new contract, which is begun and finished as one act, whether it be a sale of lands, or of goods, or even a loan of money in security, is in no sense a creditor at the time of entering into the transaction, nor does he obtain a preference to the prejudice of other creditors. Bills of exchange, consequently, granted or indorsed for value received at the time, do not fall within the act; as was indirectly found in the case of Campbell *a.* Graham,[2] which arose on an indorsation made within the sixty days; wherein it was decided, 'that the act

[2] 1713, D. Forbes, p. 646.—Dalrymple, N° 97. p. 136.

act of Parliament took place, if the pursuer proved that the indorsation was for satisfaction or security of a prior debt, and not for present value received;' which implies, that if he failed in this proof, the transaction was good. Many questions occurred respecting what was to be considered as new debts, or deeds granted in security in terms of the act, and the modes of completing the creditor's right. No title to land is complete, till seisin or infeftment has followed on the conveyance. And as infeftments in relief, not of debts due at the time, but of those to be afterwards contracted, were found to be the occasion or covert of frauds, the act has declared, that all 'dispositions or other rights, granted for relief or security of debts to be contracted for the future, to be of no force as to such debts as may be contracted after the infeftment on the said disposition or right.' However this part of the statute may apply to real or heritable rights, a conveyance of moveables, made in consideration of a sum advanced, cannot be considered as security for a former debt, merely because the last act of its completion was posterior to the moment of advance. An assignment, in security of certain debts previously due, and of a sum of money instantly advanced, executed several months before the assignor's bankruptcy, though not intimated till within sixty days thereof, was found not to fall under the rule

rule of the statute, [2] And upon the same principle, if a bill be drawn by a merchant on his correspondent in favour of one who advances money for it, strictly speaking it is neither a security nor a conveyance till accepted by the drawee: yet the circumstance of the date of the acceptance being posterior to the advance, will not entitle the creditor of the drawer to challenge it as a security for a prior debt. [3] The drawer, in this case, has done his part in completing the right of the creditor, to whom the transference is made; the procuring acceptance of the bill is an act to be accomplished without the interference of the bankrupt. But where any thing is required to be done by the bankrupt himself, in order to make the right effectual, the question is more difficult. If the bankrupt interferes to do that only which both parties understood to have been done at first, and on the faith of which the money was advanced, the act is not objectionable, nor such as to entitle the creditors to separate the security from the advance; but where he does that which both parties understood he had not done at first, and which he only bound himself to do, it is objectionable, and the creditors are entitled to reduce it.

Of

[2] 1788, Hay *a.* Sinclair, Fac. Coll. N° 28. p. 45.

[3] Bell, 1. 149.

Of the former case, there is an example in a question that occurred in 1800, where a merchant in this country having drawn bills on his correspondent in London for the amount of a cargo consigned, indorsed away the bills for value, and thereby raised money on the faith of their being accepted. The consignment was, however, rejected, and acceptance refused; upon which, the cargo was given over to another house in London, upon whom new bills for the exact amount of the former, were drawn and indorsed in lieu thereof. These new bills were challenged on the act 1696, as given in satisfaction of a prior debt; but the Court refused to sustain the action. The particulars of the case are as follow.

About the middle of March 1796, Sinclair & Williamson consigned a cargo of wheat belonging to them to Scott of London, and indorsed the bills of lading to him. Upon the 16th of the same month, they drew a bill for 1000*l.* upon Scott, and indorsed the said bill to Allan, the defender in the cause, for value given of that date. On the 18th of the same month, they drew another bill for 1200*l.* upon Scott, and indorsed it to Allan, for value given of that date. The value of the cargo of wheat exceeded the amount of these two bills, which were drawn by Sinclair & Williamson upon Scott, and indorsed to Allan, in the view of the consignment of said cargo. Scott, the intended consignee, refused to receive

receive the consignment of the cargo of wheat, and likewise to accept the said two bills drawn upon him and indorsed to Allan. The cargo and bills of lading were thereupon given to Ross of London, who, upon the 29th of March 1796, accepted two bills drawn by Sinclair & Williamson, one for 1000*l.* and the other for 1200*l.*, which were indorsed to Allan in lieu of the two former bills drawn on Scott, the intended consignee. Sinclair & Williamson were rendered bankrupt in the beginning of April. In these circumstances, the Lord Ordinary decided, 'That the bills last granted ought not to be considered as falling under the act 1696;' to which judgment the Court adhered, by refusing a petition without answers.

The latter case is exemplified by a cause that was tried in 1793,—the trustee for the creditors of John Brough *a.* Spankie and Jollie.

G. Spankie and J. Jollie, on the 6th of October 1787, accepted a bill along with Brough for 500*l.* Of the same date, Brough granted a holograph missive acknowledging that they were merely cautioners for him in the bill, and obliging himself to grant them an heritable security over certain property, in relief of their obligation. An heritable bond was accordingly made out in their favour, on which they were infeft, on the 7th December following. Brough having been rendered bankrupt within sixty days thereafter, the trustee for his creditors objected to the heritable se-

curity, as falling under the retrospect of the act 1696. And the Court unanimously sustained the objection.

Though, therefore, the payee or indorsee of an unaccepted bill may complete the transaction by afterwards procuring the acceptance of the drawee, because, by the draft or indorsation alone, the whole right is fully transferred from the drawer or indorser; yet, it is not safe to grant bills to any person in exchange for a personal obligation to give security, which may require his interference afterwards to make effectual by a voluntary deed.

Payments in cash by the bankrupt within the sixty days, are not struck at either by the act 1621, or 1696.[4] A person insolvent, discounted, by the assistance of his ordinary agent, who did not know his real situation, bills which he had in his possession, to the extent of 272*l.*, and, with the money, paid the debt and interest in a bond for 240*l.* owing by him to his sister, and was afterwards made bankrupt within the statutory period. The payment was sustained.[5] But no collusive payment made in this way will be considered effectual; as, for instance, where a bill is discounted by the creditor in the knowledge of his debtor's circumstances, and the money applied in payment

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[4] 1733, Buchanan *a.* Arbuthnot, Dict. v. 1. p. 82.—1751, Forbes *a.* Brebner, &c. Kilkerr. No. 15. p. 62.

[5] 1760, Bean *a.* Strachan, Dict. v. 3. p. 48.

ment of his own debt; or, where the bill, with the assistance of the creditor, is discounted in the bank, and the value given in bank notes to the debtor, who afterwards delivers them in payment to the creditor. For these are evidently reprehensible modes of evading the act, and an unfair attempt at obtaining a preference within the statutory period.

Where bills were indorsed by a person in Scotland before his bankruptcy, to his agent in England, who was considerably in advance for him in a business of selling goods on commission, and who placed them to his credit, although they did not fall due till after sequestration was awarded against him, they were found to be equivalent to payments of the date of the indorsations. [6]

As payments *by* the bankrupt, are not comprehended under the term 'deeds;' so, payments *to* him, can in no sense be viewed as deeds of preference. Bills, therefore, due to the bankrupt, may be paid to him at any time within the sixty days. But by the bankrupt statute 33. Geo. III. c. 74. § 29. it is declared, that 'after the date of the first deliverance upon the petition (of sequestration), all payments made by the debtor to any of his creditors, shall be void and insufficient to the receivers, in the event of

[6] 1790, Sandeman & Graham's Assignees *a.* Stein, Bell's Cases, p. 81.

a sequestration taking place; and the trustee shall be entitled to recover the money so paid as part of the bankrupt estate.[7]

In considering the rapidity of mercantile dealings, and the mutual confidence of the parties, so essential to all commercial purposes, the question is naturally suggested, Whether the transactions by indorsations, drafts, &c. of merchants with their bankers, or with each other, carried on in the course of trade, and without any suspicion of fraud, down to the bankruptcy

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7. In England, by the 19. Geo. II. c. 32. 'no person who is or shall be really and *bona fide* a creditor of any bankrupt, for or in respect of goods really and *bona fide* sold to such bankrupt, or for or in respect of any bill or bills of exchange, really and *bona fide* drawn, negotiated or accepted by such bankrupt in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt's estate, any money which before the suing forth of such commission was really and *bona fide*, and in the usual and ordinary course of trade and dealing, received by such person or any such bankrupt, before such time as the person receiving the same shall know, understand, or have notion of, that he is become bankrupt, or that he is in insolvent circumstances.'

If a debtor, after a secret act of bankruptcy of his creditor, gives him his acceptance in discharge of the debt, he may afterwards pay such acceptance to the holder of the bill, though, after the acceptance and before the bill fell due, he heard of the drawer's bankruptcy; the giving, indorsing, or accepting a bill, being considered as an immediate payment within the meaning of the statute of 1. James I. which protects *bona fide* payments made to a bankrupt, provided the bill is honoured when due.—5. 7. Durnf. & East. 711.

And if a trader delivers a bill for a valuable consideration to another, previous to an act of bankruptcy, and forgets to indorse it, he may indorse it after his bankruptcy. Peake 50.—Manning, p. 57.

ruptcy of one of them, are to be looked upon in the light of cash transactions, or as falling under the general scope of the act?

A case of this sort came to be determined in 1791. Stein, an extensive distiller at Kilbagie, had a variety of dealings with Sir William Forbes & Co. bankers in Edinburgh. Sometimes, the bills discounted by Stein being considered as cash, were immediately carried to his credit in his account current; but more frequently, no credit was given for the contents of the bills indorsed to or deposited with the Company, till they were paid by those who were immediately liable for them. Stein, on the 28th February 1788, was rendered bankrupt. On the 29th December 1787, being the sixty-first day before the bankruptcy, the sums due by him to the bank amounted to 9868*l.* 10s. 5d.; but the Company held in their hands bills and other securities deposited by Stein to a much larger amount. During the sixty days, however, which immediately preceded the bankruptcy, Sir William Forbes & Co., having no suspicion of Stein's failure, advanced large sums for him. At the date of the bankruptcy, the balance against Stein was 34,636*l.* 11s. 10d. Besides, in consequence of bills due by him, which had been discounted by other people at the same banking house, he was debtor to the Company in a further sum of 15,000*l.* But during the same period, he had deposited bills to the amount of

18,458*l.* 2s. 4d.; so that the advances exceeded the deposites by 6,309*l.* 13s. 1d. The sums deposited within the sixty days, being 18,458*l.* 2s. 4d., were challenged under the act. But the Court were unanimously of opinion that the case did not fall under the enactment, and repelled the objection to the claim of Sir William Forbes & Co. [8]

The decision in this case went entirely upon the specialty that the payments within the sixty days had not only equalled but exceeded the value of the indorsations; so that, instead of a preference or advantage being given to Sir William Forbes & Co., they would, if restored to their situation as at the commencement of the sixty days, have been great gainers. [9]

But so strictly is the statute applied to securities for former debts, that the shortest interval of time between the advance of the money and the granting of a security not originally stipulated or relied on, is fatal to the preference.

A large advance was made by the Royal Bank to Bertram Gardner & Co. at a time when they were exerting themselves to avert the bankruptcy which afterwards overtook them. This advance was made at ten o'clock in the morning. In the course of the forenoon,

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[8] The Truſtee for Stein's Creditors *a.* Sir William Forbes & Co., Fac. Coll. No. 169. p. 343.

[9] Bell, v. 1. p. 161.

forenoon, the bank began to fear for the credit of the house, and having insisted for security, Bertram Gardner & Co. deposited bills with them to a large amount. This was challenged upon the statute, as the constitution of a security for a prior debt. When the cause came into Court, it was the general opinion of the Judges, that the security was objectionable in so far as it applied to prior advances; upon understanding which, the Royal Bank at once renounced any claim upon these bills as security for the prior advance, so that the question did not come to judgment.[1]

As bills deposited in security within the sixty days may be redemanded by the bankrupt's creditors, so, there can be as little doubt, that bills indorsed or delivered in payment of prior debts, within that period, fall likewise under the statute. It has been well observed, that a debtor may gratify a favourite creditor, either by drawing a bill in his favour upon some of his debtors, or by indorsing to him a bill which stands in his person. But if the act do not strike at such deeds as these, it is plain that a trader has it in his power, upon the eve of bankruptcy, and within the sixty days, to distribute among his favourite creditors the whole of his circulating capital, except the goods

[1] July 1796, Hotchkis truſtee for the Creditors of Bertram Gardner & Co. *a.* The Royal Bank; Bell, 1. 162.

in his warehouse; nay, even these also may be thus disposed of, if he choose to sell them, and take the bills for the price payable to the creditors. It were therefore a great imperfection if the statute did not include such deeds; but the words are fully adequate to include them; and the spirit of the act is strongly applicable. The act strikes against 'all dispositions, assignations, or other deeds, made and granted in favour of creditors, either for satisfaction or further security, in preference to the other creditors;' and an original draft in the creditor's favour, or an indorsation to a draft in which the bankrupt is creditor, is strictly and properly an assignation for satisfaction or security, in preference to the other creditors.[2] It was accordingly decided in a question that occurred in 1700, that a bill drawn in favour of a creditor within sixty days of the drawer's bankruptcy, was reducible on the act 1696.[3] In the case of Campbell *a.* Graham, already quoted, the question again occurred. An indorsation by a debtor to his creditor within the sixty days, was challenged on the statute. The Court found, 'that the act of parliament 1696 concerning bankrupts, takes place if the pursuer prove that the indorsation was for satisfaction or security of

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[2] Bell, v. 1. p. 169.

[3] Durward *a.* Wilson, Dict. v. 1. p. 82.

of a prior debt, and not for present value received.'[4] A similar judgment was pronounced in the year 1780. Fletcher indorsed two bills to Campbell & MacGibbon who were his creditors. Another creditor, before the expiry of the sixty days, rendered him bankrupt, and brought an action of reduction of the indorsations against Campbell & MacGibbon the indorsees. The foregoing cases were founded on as decisive of the question. The Lord Ordinary found the bills subject to be reduced upon the act 1696, and the defenders liable to repeat the payment of them which they had received, for behoof of the pursuer and the whole creditors of Fletcher.[5] A distinction was hinted at on the bench, between the case of a creditor dwelling at a distance and one at hand receiving a payment. This distinction, however, has been since disapproved of; and in a case decided 20th May 1794, MacHutcheon *a.* Welsh, the Court held the rule to be general in its application to all indorsations whatever. The case is not reported.[6]

It must therefore be concluded, that drafts by a bankrupt upon his debtor in favour of a prior creditor, or

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[4] 1713, Forbes's Decisions, p. 646.—Dalrymple, No. 97. p. 136.

[5] Campbell *a.* MacGibbon, &c. Fac. Coll. No. 125. p. 230.

[6] Bell, v. 1. p. 171.

or indorsations to such creditor of accepted bills in the hands of the bankrupt, are, in the sense of the act of Parliament, assignations in security or payment, in preference to other creditors, and so reducible, if within sixty days of the bankruptcy. But though bills indorsed in this way be reducible in the person of the creditor to whom they have been indorsed, are they, or ought they to be so, in the hands of an onerous and *bona fide* holder, to whom they may have been afterwards transferred? This question, which is not without difficulty, seems never to have come under the cognizance of the Court. To reduce an indorsed bill of this description, in the hands of a *bona fide* third party, into whose possession it had come for value, would certainly be inconsistent with the freedom and security of commercial dealings, and the acknowledged privilege of bills, of being in the hands of onerous holders, exempt from any latent exceptions. And, at the same time, nothing would be more easy than for the creditor to indorse away for value the bills he had thus received from the bankrupt, which would be a means of defeating the very purpose and spirit of the act. The creditors of the bankrupt might, no doubt, in all cases, have a claim against the original payee or indorsee for repetition; but, in the event of his failure, they would be deprived of this resource, further than ranking on his subject; and the funds thus disposed of by way of preference being in the hands of

of third parties, would be irretrievably lost to the estate. For this, however, there seems to be no remedy; for I should be inclined to hold (though certainly with some diffidence), that a bill drawn or indorsed within the sixty days, is not reducible under the act in the person of an onerous and *bona fide* third party.[1]

If

[1] A good deal of argument might be used on both sides of this question. Upon the one hand, it might be said, 1. That as the words of the act expressly declare all conveyances by the bankrupt, within the 60 days, in payment, &c. to be void and null, the radical vitiation thereby created cannot be done away by any subsequent transference: what is void in its origin, cannot be rendered valid by any thing done to it afterwards. 2. That the general benefit to result from enforcing the statute, and preventing the undue alienation of the bankrupt's property to the prejudice of the body of his creditors, would greatly preponderate over the disadvantage to which it might occasionally expose individuals; and, at all events, a *bona fide* indorsee is not without remedy, for he may sue the indorser from whom he received the bill. But, on the other hand, in support of the opinion given in the text, may be urged, 1. The impolicy of checking commercial confidence, and diminishing the free currency of bills so necessary in trade. 2. The total impossibility, in many cases, of reducing documents of such rapid transmission as bills of exchange, in the hands of distant holders. 3. The peculiar hardship of making an innocent person, who must always be supposed to be unacquainted with the transactions of anterior holders, suffer for the acts of another. And, 4. That the analogy, in the present case, and that of bills for gaming debts, does not hold; for, in the one, it is the accepter who challenges the bill as being given for an unlawful consideration, which rendered it void *ab initio* as to him: in the other, the creditors of the drawer or indorser must attempt the reduction; and it is not very easy to perceive how the accepter is to be stopped from making payment to the holder, or on what principle the latter is afterwards to be made to refund to people he never heard of, the contents of a bill for which he had antecedently given full value to a totally distinct person.

If an indorsation to a bill have been given, not in security or payment of a prior debt, but partly for money advanced between the date of the indorsation and the bankruptcy, it will be sustained to the extent of the sum advanced.

The estate of Burnside was sequestrated on the 27. April 1793, and Ogilvie appointed trustee for the creditors. Burnside was, at this time, in an account-current with Robertson.

1792.		*Dr.*	1793.		*Cr.*
Dec. 10.	To Robertson's acceptance without value - -	L. 400	Mar. 9.	By Archibald Muir's bill indorsed to Robertson	L. 400 15 3
1793.					
Mar. 14.	To cash - - -	260	April 15.	By cash - -	197 12 0
				Balance due to Robertson - -	61 12 9
		L. 660			L. 660 0 0

Ogilvie brought a reduction of the indorsation to Muir's bill on the act 1696. It was pleaded by Robertson, 1*st*, That the act did not apply to the indorsation in question; and, 2*dly*, That at least he ought to be allowed retention to the extent of the 260l. afterwards advanced by him. The plea, as to the first point, was repelled; but the compensation was sustained to the extent of 260*l*.[a]

Though bills could not be drawn or indorsed in security or payment within the statutory period, it was

[a] 1798, Robertson *a.* Ogilvie, trustee for Burnside's Creditors, Fac. Coll. N° 91. p. 210.

was thought they might be granted as a mere voucher and acknowledgment of debt, which being simply an expeditious mode of constituting the creditor's claim without the expense of legal procedure, was not to be considered as a transference of, or bestowing any right over the funds in preference to other creditors. Accordingly, a person having granted a new bill for the amount of one that had been protested, including the interest and charges, it was sustained in a competition with another creditor.[3] And, in another case, a person being debtor to his bankers in several bills which had been dishonoured, offered the bankers, in security, a vendition to a ship, which, however, they refused. On this, he applied to a gentleman, who agreed to interpose his security, by joining him in a promissory note to them; and, in favour of this cautioner, he, on the same day, executed a vendition of the ship. Within three weeks of the transaction he became bankrupt; and an action having been brought by the trustee on his sequestrated estate, for setting aside the promissory note granted by the bankrupt, and indorsed by the cautioner, the Court found, that the promissory note did not fall under the statute.[4]

But

[3] 1762, Cowan *a.* Truſtees of Mansfield, Dict. 3. 60. Fac. Coll. 74. 167.

[4] 1790, Swinton's Truſtee *a.* Sir William Forbes & Co. Fac. Coll. No. 116. p. 220.—Dobie, after inhibition had been executed againſt him by Douglas Heron & Co., granted a bill to Brown, inſtead of one

But by subsequent decisions on analogous points, the principle seems to be established, that a bankrupt cannot, in any respect, alter the situation of his creditors; that no deeds ought to be executed by him that may have that tendency; and that it would be dangerous to support any deed of that nature.[5] All deeds that may be a cover to fraud are struck at by the statute 1696. Bonds of corroboration, bills as documents of existing debts, and deeds of a similar description, may be instruments of fraud, by enabling a creditor to accelerate his diligence, and get the start of others. The debtor may act fraudulently in refusing them to one while he grants them to another; nay, from its mere secrecy, the acknowledgment of a debt may be fraudulent; whereas a legal constitution by action being public, would have given intimation to the other creditors to take similar steps. In short, the purpose of the act is to avoid and preclude all

one of a date long prior to that diligence, and which he then retired. On this new bill, Brown led an adjudication againſt Dobie's eſtate; in the ranking of whoſe creditors, Douglas Heron & Co. objected, that the bill in queſtion having been affected by their inhibition, the diligence which followed was void. To which it was anſwered, that the bill did not conſtitute a new debt, being only a renewed document of an old one, againſt which the inhibition could not ſtrike. The Lords repelled the objection.—1785, Douglas Heron & Co. *a.* Brown. Fac. Coll. No. 223. p. 349.

[5] 1791, Creditors of MacKellar *a.* MacMath, Fac. Coll. No. 170. p. 345.—1793, Creditors of Dunbar *a.* Grant, *ibid.* No. 61. p. 133.

all questions of actual fraud in such cases, by establishing a rule, which, by its general application, may stifle fraud.

A bill or indorsation, to be liable to challenge, must be granted either after the grantor's becoming bankrupt, or in the 'space of sixty days of before;'[1] and as the acceptance of bills payable after date, and indorsations, are seldom dated, it might be sometimes difficult to ascertain at what time the acceptance or indorsation was made. To obviate which, the Court, as has been already observed, seems to have sanctioned the doctrine, that an acceptance or indorsation,[2] when not dated, is to be considered of the date of the bill; and, if it be dated, is to be held as of that date, till the contrary be proved.[3] It was observed on the Bench, in the case of the Thistle Bank *a.* Leny, 1794, where a dated indorsation, of the handwriting of the indorsee, was objected to, that, by means of an indorsation, the act 1696 might be very easily evaded. But to this it was thought a sufficient answer, that the danger struck equally both ways; for if the consequence of repelling the objection was to give an easy method of evading the act, the sustaining of it might throw loose transactions settled

[1] Ch. 5. p. 135.—Ch. 9. p. 207.

[2] Kennedy *a.* Arbuthnot.—Roffie *a.* Ogilvie.—Smith *a.* Home.—Thistle Bank *a.* Leny.

settled by indorsation, not only during the period of sixty days, but even for years preceding the bankruptcy. [3] In all cases, however, it is in the power of the creditors to do away the legal presumption of the acceptance or indorsement being of the date of the bill, by a contrary proof; and the examination of the bankrupt in sequestrations, together with the books of the parties, generally contributes to ascertain this point. As to the mode of computing the statutory period of sixty days, the rule appears to be this. The day or date of the bankruptcy is to be excluded, as descriptive of a period of time which is indivisible; and the sixty days preceding are descriptive of another and prior period, which is to be reckoned backwards, from the commencement of the day on which the bankruptcy happened. An indorsation or draft, therefore, executed on any part of the sixtieth day preceding the day or date of the bankruptcy, will fall under the act.

Frauds, by which undue preferences may be created in contemplation of bankruptcy, if not expressly guarded against by the statute, or comprehended under its spirit, may be reduced at common law. Thus, Provan & Co. bought goods from Marshall to the value of 236*l.*; and when called upon for the price, or bills at six months, which they had engaged for, they defended

[3] Ch. 5. p. 135.—Bell, 1. 190.

defended themselves, by setting off bills of Marshall's, indorsed to them by Hamilton & Co., to whom, in return, they had granted a bill for the amount of the indorsations. There was some doubt respecting the date of the sale. If posterior to the indorsation; then as Provan & Co. would have been creditors to Marshall at the date of the sale, and as Marshall was made bankrupt within sixty days, the sale would have been struck at as a security to Provan & Co. for a prior debt; and of this all the judges were clear. But if, on the other hand, the indorsation was posterior to the sale; then, although the case fell not under the statute, it was exposed to challenge as a device to give security to Hamilton & Co.; Provan & Co. getting right to their debt for the purpose of compensating or setting off the debt due by them against it. The Court gave judgment for the price of the goods, refusing to admit the compensation or set off. [4]

In connexion with the present subject, it may not be improper briefly to notice some of the other points in the general doctrine of bankruptcy, by which bills, in common with other funds, may be affected. The enactments against fraudulent alienation and unfair preferences, were made to prevent an undue distribution by the bankrupt of his undoubted property; but

[4] 1794, Marshall's Trustee *v.* Provan & Co., Fac. Coll. N° 95. p. 212.

where the property is not indisputably vested in the bankrupt, as in the case of an uncompleted sale or bargain, and claims are advanced by third parties, questions of right will necessarily arise between them and the creditors; for the adjustment of which, another set of rules must be adopted. To the completion of the sale of any property, and to vest a right in the purchaser as proprietor, tradition or delivery, actual or constructive, is necessary. But after a sale of personal effects has been made, the seller may have good reason to become dubious of the buyer's circumstances; in which case, he is allowed to seize and reclaim his goods in the way to their destination, and before a legal delivery of them has taken place. This is called stoppage *in transitu*. Under similar circumstances, is it possible to stop the payment of bills? A very usual way among merchants of settling for the price of goods, or satisfying a demand, is by a draft or order on a banker, or a bill drawn on a correspondent in favour of the creditor to whom payment is to be made. In such case, the acceptance of the order, as has been already remarked, is the completion of the transfer. Such draft or order, however, may frequently be given before the goods have been delivered to the drawer, or the equivalent and stipulated value received by him; and in the event of the failure of the person to whom the draft has been delivered without having paid value, the question might occur,

occur, whether, if the bill still remained in his hands, stoppage of payment might not be accomplished? Or, to take another view of the subject, suppose that I have, for the accommodation of a person holding bills at long dates, given him a draft on my banker in London; that, immediately thereafter, the accepters of the long-dated bills fail, and involve in their ruin the payee of my draft, may I not stop payment of my draft at the banker's, or countermand my order on my own correspondent? Upon the same principle as that on which goods *in transitu* may be stopped by the seller, it would be difficult to assign a sufficient reason why payment of a bill of this description might not be prevented; for no third party being concerned, the privileges of bills are out of the question. And perhaps the same principle might apply to the indorsation of an accepted bill in the same circumstances, the indorsee failing without having paid value, and the bill continuing in his hands unindorsed. [5]

Bills too, indorsed and remitted to a factor for a specific purpose, or deposited for a special appropriation with a banker, [6] are not, in the event of the factor or banker's bankruptcy, to be confounded with his general property, which is to be divided among his creditors, but may be traced and redemanded by

[5] Bell, v. 2. p. 142, 143.

[6] *Ibid.* p. 201. 209.

the owner, provided they can be got at before they are transferred to third parties, and before the money due upon them is received by the bankrupt, and blended with his common funds, so as to be undistinguishable from them. At least, this has been found in England, where cases of this nature are more frequent; and it is to be presumed, that our courts would determine on the same grounds.

Jenner was employed as an agent or banker, by Zink, who drew bills on him under an agreement to make remittances to answer the same when due. Jenner sent (Nov. 1776) an account current including all the accepted bills running on him up to 30th November, amounting to 1,022*l.* and making the balance due to himself 1,137*l.* Zink sent first a bill for 150*l.*, then one for 300*l.*, and, on the same day on which they were sent, Jenner became bankrupt, without having paid any of the drafts, which Zink himself was obliged to retire. Zink owed Jenner on the bill account, commission, &c. 195*l.*; and the bills for 450*l.* were, when they came to hand, deposited by Jenner's clerk, with Staples & Co., who wrote them short in Jenner's book. The plaintiff claimed his 450*l.* under deduction of the 195*l.* &c.; and the Court found him entitled to it. The bills were held to be merely deposited with Staples & Co. and to be in Jenner's hands as factor till paid, in the nature of goods unsold. Zink *versus* Walker, 2 Blackst. 1154.

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Where the intercourse between a merchant and a banker resolves into a general account, so as to render it impossible in their transactions to follow out any specific appropriation of bills deposited by the merchant, he must, in the event of the banker's failing in his debt, rank as a common creditor on the estate. But if such specific appropriation can be clearly made out as to any part of the bills or funds in the banker's hands, it may be presumed, that the doctrine above adverted to relative to depositation for special purposes, will so far apply. There can be little doubt, that where the bills deposited are negotiated by the banker with third parties, the original owner can have no claim to recover against such third parties. And even where an express purpose of deposite was evinced, bills were found not recoverable by the owners, though they had been only transmitted in a general way to another house, the partners of which were also partners of the house of the depositaries.

Bills were put into the hands of Liverpool bankers for the purpose of their providing for the payment of other bills due at a house in London. The Liverpool bankers sent the bills to the London house on the general account between the two houses. Both houses became bankrupt before the bills thus to be provided for fell due, and the depositor of the bills was obliged to pay his original acceptances. He claimed delivery of the deposited bills; and as he would clearly have

been entitled to this, had they remained with the original depositaries, so would he as clearly have had no claim after the bills went into the hands of the London house, had there been no privity or connexion between the houses. The great doubt was, whether the partners of the London house, being partners of the Liverpool house, made such privity as to alter the latter rule; and the Court found it did not. [1]

Where bills have been taken by a factor in his own name, for the price of goods sold for his constituent, the latter, in the case of the factor's failure, has a right to the bills, [2] even where the factor insures the debts, and is of course directly bound himself to the principal. [3] In the same manner, bills taken by an executor in his own name, for part of the executry effects, belong, not to his creditors, but to the next in kin of the deceased.

Murray was executor to Sir James Rochead; and having taken the assistance of Gordon in recovering the estate, a balance was struck upon Gordon's

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[1] Bolton v. Fuller, &c. 15. June 1796.—Bell, 2. 211.

[2] *Ibid.* 223.

[3] *Ibid.* 226. In this case, however, the persons contracting with the factor in his own name *bona fide*, are entitled to compensate the sum they owe by the factor's debt to them.

don's intromissions,—a bill granted by him to Murray for 286*l.* payable to order,—and Gordon completely discharged. Murray died with this bill in his possession; and some of his creditors having attached it, the question arose, whether they or the next of kin of Sir James Rochead, had the preferable right to the bill. The Court found, 'that there was sufficient evidence that the sum contained in Gordon's bill was part of the proceeds of Sir James Rochead's executry; and therefore, that Sir James Rochead's next of kin are preferable for the sum in the said bill, before the other creditors of Murray.'[4]

It has been stated, in general, that where bills are remitted to a factor for a specific purpose, and can be clearly traced in his hands, they are the property of the principal, and not of the factor's creditors. As illustrative of the particular and discriminative application of this doctrine, the following English case may be given.

Sayers, paymaster of the forces in the island of Dominica, wrote to Cheap & Co. of London, to purchase for him certain kinds of foreign coin, and enclosed for them bills upon the paymaster-general for 16,000*l.* For this amount, he desired them to give him credit, and he drew upon them for 2000*l.*

[4] 1774, Sir John Baird *a.* Murray's creditors, Kam. Rep. Dec. N° 51. p. 78.—Dict. N° 3. p. 149.

Cheap & Co. discounted the bills; and not being able to procure the coin in England, they remitted 5000*l.* to Peter & Co. at Lisbon, with directions to purchase the coin wanted, or, if not to be procured, to return the money in good bills. They afterwards sent a similar sum, with the same directions. Not being able to procure the coin, Peter & Co. sent back the money in good bills, not indorsed by them; and Cheap & Co. having become bankrupts, those bills came into the hands of the assignees, and Sayers petitioned to have them delivered up, as specifically his property. Lord Chancellor Loughborough, in deciding this case, proceeded upon the following grounds. 1st, That the money was sent for a particular purpose to Cheap & Co. 2dly, That the correspondence showed the remittance by them to Lisbon to have been made for the specific purpose of executing the trust, by making the purchase. 3dly, That if the coin had been returned, it would have been specifically the property of Sayers, and not a general debt, being purchased by his order with money remitted for the purpose. 4thly, That if Sayers had gone to Lisbon, he might have stopt the transaction, and taken bills instead of the coin ordered. 5thly, That the bills, when sent to London, might equally well have been taken by Sayers, had he been there; and, on the whole, that the right of Sayers to the bills should be allowed. His Lordship at the same

time

time acknowledged the case to be difficult, and offered to take it for further consideration. The general ground of his decision was this, 'that the money acquired an identity, and a distinction from the rest of the fund, by the application of it in sending it to Portugal.'[5]

II. In arranging the mutual claims of bankrupt estates, arising from bill transactions, and what is called cross paper, many perplexing difficulties, and almost insoluble cases, present themselves. The ranking of these debts frequently involves questions of retention, compensation, indemnification, and relief of a very complex and inextricable nature. The great object is to ascertain and apply some equitable rule, which might embrace the great mass of mercantile cases of this description; but this it has been found no easy matter to do. The general principle which regulates the doctrine of ranking, is, that no personal debt can be ranked and proved more than once against the bankrupt estate, or be made the ground of a double claim, so as to draw a larger dividend than any other personal debt. The application of this rule to common claims, is sufficiently obvious and easy. A creditor, by bill, is entitled to rank upon the bankrupt subjects of the whole proceeding

[5] Ex parte Sayers, 5. Vesey junior, 169.—Bell, 2. 229.

ceding parties in the document, and to draw from their respective estates a dividend corresponding to the debt, as he has an equal claim of recourse against them all. Where bills too are paid away, or granted in the regular course of trade between two persons, and negotiated by them with third parties, it is evident that, in the case of the bankruptcy of the former, the holders of the bills have a right to rank on the estates of the debtors, and draw from each of them such dividends as the estates may yield, till the debt be extinguished, or the estates exhausted. Where mutual accommodation bills have been given, and the creditors alone of the bankrupt parties are concerned, these bills must be placed against each other, either in the way of compensation or retention; and this holds though the estates may pay very unequal dividends. Where these bills have been negotiated with third parties, the holders of the bills must rank on the different estates, and draw the usual dividends; in which case, no claim of relief is competent to the one bankrupt estate against the other, on the footing of a disparity in the dividends; that disparity being a mere matter of chance between the two estates. But another fundamental rule of ranking is, that by no contrivance can a creditor have his claim enlarged against the common funds beyond the consideration given for it. Now, in the exchange of accommodation paper, it is sometimes extremely difficult to guard against

against or prevent double ranking. In a cross bill transaction, the only consideration given by one of the parties for the bill which he receives, is his own note. If he discounts the bill, and the parties become bankrupt before it is taken up, both the holder of the bill, and the holder of the note, rank upon his estate, which is in effect a double ranking for the same debt, in whatever shape the documents may appear; and if this be allowed, it is not easy to see how a limit can be put to it. For, if the bill will not discount with the names already upon it, he may get it fortified by four or five additional names, to each of whom, in return, he grants a separate note. All that he draws on procuring the bill discounted, is 20s. in the pound; but, upon his failure, six or seven creditors will be entitled to rank on his subject for the precise same debt; so that if the estate gives 4 or 5s. a pound, about 30s. in the pound may be paid on that debt, while the other creditors only receive 4 or 5s. on theirs. It is true, that payment of the dividends on contingent claims is suspended, till it appear how far the claimants have been burdened with the debt for which they claim. But suppose that some of the holders of the above mentioned notes have also used them as accommodation paper, and transferred them to onerous and *bona fide* indorsees; it is manifest, that these indorsees are entitled to rank and draw an immediate dividend; and if the whole notes have been

been so used, (which is supposing an extreme case), 30s. per pound, as above stated, may actually be drawn upon a debt that has only produced 20s. in the pound to the bankrupt estate.

That there is considerable danger of double ranking in cross paper transactions, arising from undue retention or other inequalities, may be gathered from the following case.

The Scotch house of MacAlpine & Co., and the English house of Livesay Hargrave & Co., agreed that an exchange of bills should be made between them, with the view of supporting each other's credit. Accordingly MacAlpine & Co. received from the English house, bills to a large amount, drawn by them, and accepted by Gibson & Johnston; and gave in return their own acceptances and indorsed bills, many of which came into the hands of Gibson & Johnston. In this situation, the whole parties became bankrupt. Bills accepted, drawn, or indorsed by MacAlpine & Co. to the extent of about 25,000*l.*, were at this time in the hands of Gibson & Johnston; and the assignees of their estate, under a commission of bankruptcy, entered a claim for this sum upon the estate of MacAlpine & Co. To this claim it was objected, that bills accepted by Gibson & Johnston, to the extent of about 22,000*l.*, had been put into the hands of MacAlpine & Co., which they had indorsed, and which, not having been retired

by

by the accepters, were now ranked on the estate of MacAlpine & Co.; and that therefore their amount fell to be retained and deducted from the claim of Gibson & Johnston, who could only rank for the balance, being about 3000*l.* The holders of the bills accepted by Gibson & Johnston, had also claimed on their estate, and had drawn a dividend of 5*s.* 8*d.* in the pound. The estate of MacAlpine & Co. had paid nothing; but it was stated as pretty clear that it would yield 2*s.* 6*d.* *per* pound.

The Court 'found, that to the amount of the acceptances due by Gibson & Johnston, the plea of retention was well founded; and that, till relief is given to that amount, the assignees under the commission of bankruptcy awarded against Gibson & Johnston, are not entitled to be ranked upon the sequestrated estate of MacAlpine & Co.; and so far sustained the objection in question.' This decision was altered on an appeal; and the House of Lords 'ordered and adjudged the cause to be remitted back to the Court of Session, to rank the appellants pursuant to their claim, and to proceed further in the case, according to justice.'[6]

It was observed in this case, that if MacAlpine & Co. had still been possessed of the bills of Gibson

[6] 1794, Curtis *a.* Chippendale, Fac. Coll. No. 140. p. 318.—House of Lords, 23. February 1797.

son & Johnston, they would no doubt have been entitled to plead compensation against the claim. But by indorsing them for value, they had transferred their right in them to the holders, who had accordingly ranked for them on Gibson & Johnston's estate, and drawn a considerable dividend. If in this situation, MacAlpine & Co. were entitled to plead retention, it would produce the utmost inequality and embarrassment in the division of bankrupt estates. For as bills must necessarily pass through the hands of many indorsers, all of them, if they happened to be debtors to the accepter, would have a right of retention; in which case, sums of money might be withheld from the estate of the accepters, to ten, twenty, or thirty times the amount of the bills due by them. Besides, as the holders of Gibson & Johnston's bills had drawn a dividend of 5s. 8d. in the pound from their estate, if the objection was to be sustained, a further dividend would virtually be paid on them, corresponding to the dividend which Gibson & Johnston would otherwise be entitled to draw from the estate of MacAlpine & Co. for the bills on which they claimed; and were this to turn out no more than 2s. 6d., still the bills of Gibson & Johnston, indorsed by MacAlpine & Co. would be drawing nearly a third more than their own debts, that is, 8s. 2d., and the others only 5s. 8d.

And

And it has been since remarked, that if the decision of the Court of Session had been supported, it would have virtually been giving a sanction to double ranking on the personal estate for one debt. When the Court of Session allowed the Scotch Company to retain against Gibson & Johnston the dividends due on their own acceptances in Gibson & Johnston's hands, by indorsation from Livesay Hargrave & Co.; this could be allowed only in security of an indemnification to the Scotch house for the claim already made against their funds by the holders of Gibson & Johnston's acceptances, which the Scotch house had indorsed; for the Scotch house had no other claim against Gibson & Johnston. But the holders of these bills had not only claimed from the Scotch house but from Gibson & Johnston; and therefore, the very debt had already been directly ranked on Gibson & Johnston's estate, which the Scotch house was now to rank for a second time on the dividends in their hands belonging to Gibson & Johnston, and forming a part of their personal estate. The House of Lords appears to have placed the matter on its true footing: for, as, on the one hand, there was no room for the plea of retention; so, on the other, there was no room for objecting that the sustaining of the claim of Gibson & Johnston would give a double ranking on the Scotch estate; since the bills already ranked in recourse on the Scotch estate, *were not the consideration* which Gibson

son & Johnston had given for the bills on which they claimed, but these bills had come into their hands from *a third party*, Livesay Hargrave & Co., in the course of trade with them. [7]

In a subsequent case, but under different circumstances, retention was also refused.

Laidlaw accepted bills drawn by Forrester & Co., to the amount of 831*L*, and, on the other hand, they at the same time granted promissory notes to Laidlaw for about the same amount. Forrester & Co. indorsed Laidlaw's bills, and received their value; but Laidlaw kept Forrester & Co.'s notes in his possession,—and both failed. The holders of Laidlaw's bills drew 10*s*. in the pound from his estate. They also ranked for the amount on Forrester & Co.'s estate, from which it was supposed they would draw 5*s*. more. The trustee for Laidlaw's creditors having claimed to be ranked on Forrester & Co.'s estate for the promissory notes granted by them to Laidlaw, and still in his hands, the claim was objected to, on the footing that these promissory notes did not create a debt against Forrester & Co. distinct from that due by them in consequence of the accommodation bills which they received from Laidlaw and got discounted. These bills were the only value which they received for granting them; and had Forrester & Co. paid them, Laidlaw

[7] Bell, v. 2. p. 421.

Laidlaw would have had no claim for the notes. These promissory notes, therefore, were to be considered in no other light than as a security put into Laidlaw's hands by Forrester & Co. in relief of the obligation which he had undertaken by accepting the accommodation bills. And as these bills were already ranked on Forrester & Co.'s estate, the trustee was entitled to plead compensation or retention against the claim made by Laidlaw's creditors; for, to sustain the claim, would be to allow both the creditor and cautioner of the debtor to rank for the same debt. The Court repelled the objection, and allowed Laidlaw's trustee to be ranked for the full sum in the bills. [8]

On this judgment the following observations have been made. It is difficult not to acknowledge, 1. That to allow Laidlaw's claim, without supporting the plea of retention, was just to allow a double ranking on

T Forrester's

[8] 1796, Nairne *a.* Cranstoun, Fac. Coll. No. 213. p. 502. As to ranking on bill transactions, see also 1790, Sandieman & Graham's Assignees *a.* Stein, Bell's Decisions, p. 81.—In this case, the assignees advanced a claim of retention over certain bills which had been indorsed and remitted by Stein, before his failure, to Sandieman & Graham, by whom they were discounted, and placed to his credit, although they did not fall due till after sequestration was awarded against him. The right of retention was refused, as the bills were held as payments, of the date of the remittance, seeing that the indorsees had been thereby enabled to raise money on them. The assignees were accordingly obliged, in stating their claim against the estate, to give credit for their amount.

Forrester's estate for the same debt, since the one set of bills had already ranked on that estate, and the other set of bills was in Laidlaw's hands merely as an indemnity. And, 2. That the only effect of such retention would have been nearly or precisely the same with what takes place in England, where the dividend for ranking on cross paper by a nominal creditor, though in reality only a surety, is suspended till it should be seen what the surety actually pays, and how far he exonerates the estate from his own paper. It was urged, that the estate of Forrester & Co., who had discounted the bills, was benefited to the full amount of 20s. *per* pound by that discount, of which the holders of these bills only got back from it 5s. in the pound; so that, even after Laidlaw's creditors ranked upon Forrester's estate for the promissory notes and got other 5s., it would in fact be only 10s. in the pound; whereas the holders of the bills accepted by Laidlaw, having drawn 10s. in the pound of their amount from his estate, it is obvious, that his creditors would lose, at all events, a sum equal to 5s. in the pound on these bills; and were the objection to be sustained, they would lose precisely the 10s. which had been paid them out of his estate. The conclusion deduced was, that even the refusal of retention left the estate of the discounter still highly benefited, while the holder of the cross paper was not reimbursed. But is there not reason to question this view?

view? It would indeed be quite correct, if both parties were solvent; but in bankruptcy, it will be remembered, that every personal creditor is to be held as having equally benefited the bankrupt's estate to the amount of 20s. *per* pound, while yet he has drawn no larger a dividend, and is in the very condition with the creditors in the discounted bills. But how should the mere circumstance of more than one party being engaged with the latter, give a double advantage, without transgressing the plain rule, that no one debt can rank more than once? Another view that weighed much with the Court was, that in such cases, the object should be, to preserve, if possible, equality between the parties. This principle is entitled to every regard between solvent parties to a contract; but bankruptcy reduces all personal creditors to a level; and, laying aside all views of hardship, and all chance differences of the value of obligations, requires a court of law to apply, without reluctance or exception, the same rules to all cases, *viz.* that no debt is to be ranked for, more than once; and that no two parties are to be ranked at once for the same debt. It is no longer the one of the original parties that contends with the other, but the creditors of the one with the creditors of the other; each being entitled to claim the whole personal funds of their debtor, and to exclude double ranking for the same sum.[9]

[9] Bell, v. 2. p. 422.

This undoubtedly seems to be the just view of the doctrine on general principles. If Laidlaw's estate had paid dividends to the extent of 15s., and Forrester's estate to the extent of 5s. in the pound, to the holders of the bills, the debt would have been extinguished: and Laidlaw's creditors might then have drawn from Forrester's estate a dividend corresponding to the amount of the 15s. in the pound so paid by them; a sum for answering which contingency it was the duty of the trustee to have reserved from the funds. Were the principle of the decision universally acted upon, it might lead to considerable inequality in the distribution of bankrupt property. Had Laidlaw's estate paid 5s. in the pound to the holders of the bills, and then ranked for the counter paper on Forrester's, which we will suppose to yield 15s. in the pound, the estate of Forrester, in that case, would pay on the same debt, though constituted by different documents, 30s. in the pound.

But there certainly is among all mercantile people a received and inveterate notion, that an interchange of bills between two traders solvent at the time, creates two distinct debts, which, in the event of failure, entitles the holder of the documents, whether the original receiver, or a third party, to rank for the amount. They consider it much in the same light, as if an exchange of notes of the same value, though, perhaps, of different currencies, had been made. The deterioration

tion of the paper by the bankruptcy of either of the parties, is one of the circumstances which they take into consideration, and does not in any respect affect the original fairness of the transaction. Forrester's estate was unquestionably benefited by Laidlaw's bills to the extent of 800*l.*; while Laidlaw's estate, from a negligence perhaps on his part, in not discounting the counter bills, was not benefited a farthing by the transaction, but, on the contrary, was a loser of 400*l.* It would be hard to say that Laidlaw's creditors were not entitled to draw from Forrester's estate an indemnification for this loss, by ranking for those very bills, in consideration of which, other bills had been granted, that had enabled Forrester to add 800*l.* to his divisible funds. The principle of suspending payment of dividends in England is nearly the same with that of withholding payment of dividends on contingent claims in this country. The claims, in this country, of which payment is suspended, are really contingent; and it would be unjust to pay a dividend on a debt that might not eventually land on the claimant or the estate. But, in the above case, the debt was not wholly contingent. Laidlaw's creditors had actually paid 10s. per pound on the accommodation paper granted to Forrester, in relief of which, they claimed to be ranked for the amount of the counter bills; and it was the opinion of the majority of the judges, that Laidlaw's creditors ought to be allowed no more than

what was sufficient to indemnify them. They were accordingly ordered to be ranked on Forrester's estate for that purpose; but, instead of being only permitted to draw a dividend on the sum actually paid out by them, and payment of the remainder suspended till it should appear how much was drawn from the estate by the holders of Laidlaw's own acceptances, they were allowed to draw a dividend for the whole amount of the bills in their hands, while a similar dividend was paid to the holders of the bills discounted by Forrester; which was, no doubt, authorising a double ranking for the same debt, unless it be held that the counter bills created a distinct debt. If the general rule, that no debt is to rank for more than it has produced to the estate, could be rigidly applied in all cases, every double ranking of this nature ought at once to be cut off. But it has been shown, that in some cases it is hardly possible, if not absolutely impracticable, to do this; and, at the same time, to preserve the privileges of bills as unexceptionable documents of debt, in the hands of onerous and *bona fide* holders. And to make a partial application of the rule would scarcely answer the end proposed, in opposition to those general principles of equity which might be judiciously applied to the adjustment of particular cases, according to the peculiar circumstances with which they are attended.

CHAP. XIII.

OF LETTERS OF CREDIT.

LETTERS of credit bear a close affinity to bills of exchange, and owe their origin to the same cause, viz. the difficulty and danger attending the transmission of cash to foreign parts, or to any considerable distance in the same country. A letter of credit, properly so called, is a mandate or order from a person in one place, to his banker or correspondent in another, authorizing him to advance to a third person mentioned in the letter, sums of money to a specified or unlimited extent; for which advances, he who gives the letter becomes responsible. No person of ordinary prudence (unless he means to bestow the money by way

of gift), will grant a letter of this description, without being pretty well assured of reimbursement for the sums which he thus allows to be advanced on his credit, especially as an unrestricted credit may, in many cases, be abused. To guard against accidents, such as the bearer losing the letter, or being robbed on the way, Savary recommends it as a necessary and proper precaution to describe minutely the person and appearance of him to whom the letter is given. But another species of letters of credit has grown into practice among merchants. A person, from being unknown in a particular place, or from his responsibility being doubted, may find it difficult to purchase goods upon his own credit; in which case he gives a reference to some house by which he is better known, or obtains from a friend a letter, certifying that he is in good circumstances and worthy of credit, and engaging to see paid the debts which he contracts. This, strictly speaking, is more a letter of guarantee than a proper letter of credit; but the term is now indiscriminately applied to both. In letters of credit, strictly so called, he who advances the money has a direct claim against the writer of the letter for the money so advanced. But in letters of guarantee for the price of goods furnished, the writer of the letter is only eventually and subsidiarily liable, should the party to whom the goods are delivered be found unable to pay the price,

price, which renders it necessary that he be discussed before any claim can be made against the guarantee. [1]

Letters of credit, like bills, being extremely useful in commerce, have been indulged with similar privileges. They are obligatory and probative against the grantor without witnesses, and whether holograph or not; as are all missive letters *in re mercatoria*. [2]

In the first cases that occurred in this country, relative to proper letters of credit, it was thought, that, in order to make merchants liable for their letters, regular notification of the advance was necessary, in the

[1] Boucher deſcribes another ſort of letters of credit, which he calls commercial mandates. A commercial mandate is a letter by which a mercantile houſe orders another houſe in the ſame city to pay, within a limited time, to the bearer, a certain ſum ſpecified in the letter. Theſe commercial mandates ſeem to be ſynonymous with our inland drafts or orders, differing ſomewhat in their form, but regulated nearly by the ſame laws. They are ſtrongly praiſed and recommended by Boucher, as by their means a creditor, ſuſpicious of his debtor's circumſtances, derives, from his acceptance of the order, a ſecurity which he could not directly demand, without doing ſome injury to the debtor's credit: And a debtor, who wiſhes to protract or evade payment, is thus brought at once to the teſt, without any apparent ſeverity on the part of the creditor; for the debtor connot refuſe acceptance, without expoſing himſelf to judicial diligence, which might otherwiſe have appeared harſh on the part of the creditor, but is now the juſt puniſhment of diſhonouring his order. N. 1551.—*Vide* Ch. 4. p. 124.

[2] 1739, Goodlet Campbell *a.* Lennox.—1779, Clark *a.* Roſs, Dict. v. 4. 412.—See alſo, 1752, Campbell *a.* MacLauchlan, Kilker. (Proof) N° 16. p. 448.

the same manner as in the negotiation of a bill;[3] for which three reasons were assigned. 1*st*, That the writer of the letter might know that credit was given; 2*dly*, That he might know how much was given; and, 3*dly*, That he might know whether or not the holder of the letter had repaid it. But it is now well ascertained, that the writer of the letter is liable for the advance, without any such notification.

Weir gave Johnston a letter of credit upon Mansfield, of the following tenor. 'According to our communing Saturday last, with respect to George Johnston, you will be pleased to give him credit for 150*l.*, and I promise to see you paid.' Mansfield, accordingly, gave Johnston letters to his correspondents in England, to let him have what goods he wanted to that extent; with which credit, having gone immediately to England, he, upon his return, set up a shop, which he kept for about two years, and then stopped and absconded. Mansfield brought an action against Weir for payment, and proved the credit given, by the bills drawn by his correspondents in England, partly on himself, partly on Johnston, which he paid and retired, and by the invoices accompanying these drafts. Weir pleaded, in defence, that no notification of the credit having been given, was made

[3] 1681, Ewing *a.* Burnet; and, 1731, Earl of Dundonald *a.* Watson, Dict. 1. 547.

made to him prior to the raising of the action. The Lords, however, repelled the defence, and found him liable. [4]

A similar determination was given in the case of Hamilton *a.* Carlisle & Dunlop, in 1766.

In 1762, Douglas of Glasgow, wrote to Hamilton of London, that he wanted to raise 500*l.* by drawing bills on London at long dates, and remitting bills at short dates to replace them, and asked leave to draw on him for that purpose, promising to get the security of J. Carlisle and J. Dunlop, with whom he was engaged in a copartnery trade. The proposal being agreed to, a letter was subscribed by Carlisle & Co. referring to Douglas's letter, and engaging their security for such sums as Douglas should draw for. In January 1763, Hamilton, who had hitherto traded by himself, assumed a partner into his house, but continued to answer the bills drawn by Douglas as he had done before, till August 1763, when he was in advance about 608*l.* Carlisle & Co. stopped payment in November 1763, and Douglas accepted bills for the balance due; but he having also failed, Hamilton brought an action against J. Carlisle and J. Dunlop the guarantees, who objected that they were not liable for the bills drawn by Douglas, in respect they were not intimated to them. And admitting that it was not

[4] 1749, Mansfield *a.* Weir, Kilker. N° 2. p. 337.

not necessary to intimate every individual draft, yet intimation ought to have been made when any material circumstance occurred, such as might have led them to withdraw their security, or warned them to look for relief. Two periods were pointed out; the one when Hamilton assumed a partner in January,—the other when his dealings with Douglas came to an end in August 1763. To which it was answered, that the pursuer could be bound no further than to comply with the conditions of the mandate. But the letter contained no clause requiring intimation of the advances, of which the defenders, the partners of Douglas, could not be ignorant. And there was no reason for a particular intimation upon the pursuer's assuming a partner, which made no alteration upon the credit. The Court found the letter of credit extended to the sum of 500*l.*, and that the Company was liable to that extent. [1]

The terms of a letter of credit must be strictly complied with by him to whom it is addressed, otherwise the grantor is freed from his obligation.

An order having been given by Rattray to Paisley, to furnish C. & J. Nisbets with sugars, to the extent of 10*l.* on their joint bill, at such date as might be agreed upon, which, if not retired, he would see paid,

[1] Fac. Coll. N° 33. p. 255.—See alfo Stewart *a.* Drew, 17. February 1779.

paid, the sugars were furnished by Paisley; but no bill was taken by him from the Nisbets for the amount. J. Nisbet went soon after to settle in London, and C. Nisbet became bankrupt; upon which Paisley pursued Rattray and the Nisbets for payment of a balance still due of the price of the sugars. Rattray stated, in defence, that Paisley the pursuer had deviated from the terms of the mandate, by not taking a bill from Nisbets for the amount of the goods furnished, which was sufficient to bar the action of recourse. Rattray was not obliged to show that he suffered a loss by this deviation from the mandate. In order to found the mandatary in any action against the mandant, he must implement the terms of the mandate specifically. Paisley was not at liberty to substitute an open account in place of the bill, even though it had been equally beneficial to the mandant. But an open account is not held as equivalent to a bill; and it would be a dangerous precedent in mercantile transactions, if letters of credit were to be so interpreted. A bill affords a more easy and expeditious method of obtaining payment; and therefore, it is a deviation to the prejudice of the writer of the letter, if it is neglected to be got when stipulated. And so the Court found. [1]

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[1] 1779, Paisley *a.* Rattray, Fac. Coll. N° 51. p. 91. An order taken by a travelling agent or rider, is binding upon his constituents. A merchant having given to the rider of an English house

A letter of credit may be constituted, so as to make the writer liable, though it do not expressly bear that he interposes his security, or meant to come under any direct engagement, if it be such as to induce the person to whom it is addressed to give credit, when he otherwise might not.

Brown sent Crichton Strachan Bell & Co. an order for a quantity of sugar, to which Jack, who had formerly been in the practice of dealing with them, subjoined the following note, addressed to Crichton & Co. '15th February, 1796. Gentlemen,—My friend, Mr Brown, is a young man merely begun business. You may safely send him the above order. In doing which, you will very much oblige your, &c. (Signed) WM. JACK.'

Crichton & Co. accordingly, on the 16th February, sent Brown a part of the sugar commissioned; and in consequence of a new order, they sent him, on the 29th March, a small additional quantity. About the middle of June thereafter, Brown became bankrupt,

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house an order for a certain quantity of tea, the house, on account of some difficulty that had occurred in obtaining payment of a former debt from the merchant, refused to execute the order. The person who had given it, brought an action of damages against them. The Court were of opinion, that a rider or travelling agent, who receives an order, comes under an obligation for the merchant by whom he is accredited; and therefore found, that as the defenders had failed to deliver the tea purchased by the pursuer, they were liable to him in damages. 1803, Milne *a.* Harris James & Co. Fac. Coll. No. 108. p. 238.

bankrupt, and left the country; on which Crichton & Co. brought an action for the price of the sugar against him and also against Jack, who, they contended, had become his cautioner, by the letter of credit which he added to the first order. In defence, Jack stated, that his uniform practice of dealing with the pursuers had been on two months credit; and that Brown was solvent, not only on the 15th February 1796, the date of his letter, but for upwards of three months thereafter. He further pleaded, that the letter founded on is merely a declaration that Brown was solvent at its date; and it was an established principle of the mercantile law, both in this country and England, that no action will lye on such letter, if the writer really believed the person recommended to be solvent, although in this he should be mistaken. But Brown was solvent both on the 15th February, and for a period after it, which exceeded the length of the credit usually given by the pursuers. So that, even if the letter were actionable, the delay on their part, considering the unfavourable nature of a cautionary obligation, would have been a relevant defence against the action. The Lord Ordinary repelled the defences, and found expenses due; and a reclaiming petition against the judgment was refused without answers. [a]

In

[a] 1797, Crichton & Co. *a.* Jack, Fac. Coll. N° 41. p. 97.

In delivering a letter of credit, care should be taken that it be explicitly worded, so as to exclude any latitude of interpretation, as to the sum to be advanced beyond what was intended; or any optional power in the receiver to apply to different persons for the same sum; for if each of these persons be applied to and furnish the money, the writer will be liable to both for the amount furnished.

G. Home wrote a letter to his brother J. Home of London, 'that he was content to advance him 30*l.* to supply his necessity, and had written to Edinburgh to send him credit for it; but that if he thought it would be too long ere it came to his hand that way, he might show his letter to Mr Foulis, and give him a bill upon him for the 30*l.*, which should be honoured, and so to get the money from him or Mr Elliot, and it would be punctually paid.'

J. Home, having taken up the 30*l.* from Mr Foulis, drew a bill upon his brother for it, which was paid; and some months after, drew another bill upon him for 13*l.*, payable to Mr Elliot, who pursued G. Home for payment. G. Home contended, that he could not be liable for the 13*l.* because his letter was fulfilled by paying to Mr Foulis the 30*l.* therein contained, several months before his brother received the 13*l.* from Mr Elliot; and he could never be liable by his letter for twice payment of the same sum. In reply to which, it was stated, that the defender's letter

ter to his brother being a letter of credit for taking up 30*l.* from Mr Foulis or Mr Elliot; although he got the sum from Mr Foulis, yet, having kept the letter, and showed it afterwards to Mr Elliot, the latter was *in bona fide* to advance money on it, not knowing that Foulis had already made payment. For the defender, after he repaid the 30*l.* to Mr Foulis, should have got up his letter; and that being omitted, he ought to be liable for the 13*l.* And the Court accordingly found him liable. [7]

[7] 1705, Elliot *a.* Home, Dict. v. 1. p. 546.—Forbes's Dec. p. 38.

APPENDIX,

No. I.

ADDITIONAL FORMS OF BILLS FOREIGN AND DOMESTIC.

N° 1.

Exch. for L. 615 : 1 : 9 Sterling, at 40 per cent.

Jamaica, 26th April, 1806.

Ninety days after ſight of this our ſecond of exchange, (firſt and third of the ſame tenor and date not paid), pay to the order of Mr John Beveridge, ſix hundred and fifteen pounds one ſhilling and nine-pence Sterling, value received, and place the ſame, with or without further advice, to the account of

SMITH JOHNSTON & Co.

To Meſſrs Leitch & Gordon, merchants, Glaſgow.

N° 2.

St Petersburg, the 28th Auguſt, 1806.—R^s 4900, at 31½d. Sterl. p. R.

Three months after date, pay this our firſt of exchange (ſecond not paid) to the order of Mr John Mackenzie, the ſum of four thouſand rubles, at thirty-one and one eighth pence Sterling per ruble, value in account, as per advice from

To Meſſrs W. & S. Scott, merchants, Glaſgow.

WM. GRIERSON & Co.
W. & S. SCOTT.

Payable at our counting houſe.

This bill is due on the 9-12th December.

N° 3.

Exch. for L. 300 Ster. at 11½ florins p. pound.

London, 18*th March*, 1807.

At two and one half uſances, pay this my ſecond of exchange (firſt not paid) to Mr Edward Hope, or order, the ſum of three hundred pounds Sterling, at eleven and one half florins p. pound, value in account as adviſed.

JOHN TOMLINSON.

To Meſſrs Ermanthal & Co.
Rotterdam.

N° 4.

Exch. p. L. 2500 Sterling. *St Chriſtophers*, 11*th November*, 1806.

Ninety days after ſight of this our third of exchange, (firſt and ſecond of the ſame tenor and date not paid), pay to the order of Mr James Swinton, two thouſand five hundred pounds Sterling, value received in negroes for your eſtate, and place it to account of Mr Timothy Barbour, as per advice.

To Jacob Finlayſon Eſq.
Glaſgow.

J. HODGSON, for Self &
Q. Q. JACOB FINLAYSON.

This bill is drawn per procuration, or Q. Q. (*Qualitate Qua*) of the drawee; and therefore, if he refuſes to accept, he may be charged on horning as a drawer.

N° 5.

Liſbon, 16*th September*, 1806. Exchange p. Milrees 5000.

At thirty days ſight, pay this my ſecond of exchange (firſt not paid) to the order of Mr Archibald Wilſon, five thouſand milrees, at five ſhillings and twopence per milree, value in account with Sr Antonio Videtti, and place it to your account, as per advice.

WM. GLENLINSON.

To Mr Henry Williamſon,
merchant, Edinburgh.

N°

N° 6.

Hamburgh, the 13th May, 1806,—for L. 200 Sterling.

At three uſances, pay this our firſt of exchange (ſecond not paid) to the order of Meſſrs J. Hobſon & Co., the ſum of two hundred pounds Sterling, value of the ſame, and place it to account, as per advice from

To Meſſrs Thomas Welleſley & Co., London. } BLAIKER & Co.

Accepted. THOS. WELLESLEY & Co.

N° 7.

Exch. for Lrs. T. 2000. *London, 29th April*, 1796.

At uſance, pay this, my only bill of exchange, to Mr Pierre Duton, or order, two thouſand livres tournois, value received, and place it to my account, with or without advice.

To Meſſrs J. & T. Berger & Co. merchants, Baſle. } WALTER RICHARDSON.

Acc^e. J. & T. BERGER & Co.
pour deux mille livres tournois.

N° 8.

Exchange for L. 100. *New-York, 22d Auguſt*, 1806.

Thirty days after ſight of this my firſt of exchange, (ſecond, third, and fourth of the ſame tenor and date not paid), pleaſe pay Mr John Donald, or order, one hundred pounds Sterling, value-received, which place to account, with or without further advice from

Your humble ſervant,

To Mr James Jeffery, Glaſgow. } RICHD. DICKSON.

N° 9.

L. 100 Sterling. *Edinburgh, 7th April*, 1807.

Ninety days after date, pay this, my only bill of exchange, to Mr James Jefferſon, or order, one hundred pounds Sterling, valùe received of him, and place the ſame to account, as per advice (or without further advice) from

To Mr Robert Wallace, merchant, Dumfries. } RICHD. DICK.

Accepted. ROBERT WALLACE.
Payable at my counting houſe.

N° 10.

L. 175 Sterling. *Glaſgow, 5th June,* 1806.

Conjunctly and ſeverally, at the term of Martinmas firſt to come, pay to me, or my order, at the Ship Bank here, the ſum of one hundred and ſeventy-five pounds Sterling, for value received.

To Meſſrs James Hamilton, merchant in Glaſgow, and John Fraſer, farmer at Weſtburn.

p. proc^{n} of J^{s} White,
ROB. THOMSON.
JAS. HAMILTON.
JOHN FRASER.

N° 11.

L. 57. *Greenock, 6th May,* 1807.

At ſight, pay to William Groſe Eſq. or order, fifty-ſeven pounds Sterling, which place to my account, without further advice.

To Mr Nicholas Brown, merchant, Aberdeen.

HENRY GORDON.

A FRENCH BILL.

Baſle, le 1 Juillet, 1806. Pour L. 195 : 17 : 6 Sterling.

Au huit Octobre prochain, payez par cette ſeconde de change, (la premiere ne l'étant), à l'ordre de Mrs Gros Davillier & Co., cent. quatre vingt quinze livres, dix ſept ſols, ſix deniers Sterling, valeur en compte, que vous paſſerez, ſuivant avis de

A Meſſieurs Mrs Is. Cazenau & Co. Londres.

E. B. ROLLAND.

DES ENDOSSEMENS.

Payez à l'ordre de Meſſrs J. R. Deſarts, valeur reçue le 8 Juillet 1806.

GROS DAVILLIER & Co.

Payez à l'ordre de Monsr B. L. Fould, valeur en compte.
Paris, 8 *Juillet,* 1806. J. R. DESARTS.

Pay to the order of Mr John Thorburn, value in account.
B. L. FOULD.

A FRENCH

A FRENCH BILL IN THE REVOLUTIONARY STYLE.

Bordeaux le { *sixieme Nivose, an* 12. / *27 Decembre* 1803. } Pour 2600 eçus, à 55 d.

A deux uſance, payez par cette premiere de change au Citoyen Durand de cette commune, ou ordre, deux mille eçus à cinquante cinq deniers de gros, valeur reçue comptant du Citoyen Cordova, et la paſſerez, ſuivant l'avis de

Votre affectionné ami,

Aux Citoyens Williams, freres, negocians à Amſterdam. } BEAULIEU.

AN ITALIAN BILL.

Venezia, li 13 *Novembre*, 1801. Pr L. 367 : 1 : 4 Ster.

Ad uſo pagate p^r queſta ſeconda di cambio (una ſol volta) all ordine S. P. delli Sig^ri Willm Richardſon & Comp. la ſomma di Líre trecento ſeſſanta ſette, ſoldo uno, & denari quatro Ster^s valuta in conto e poneteli, come p. la d'aviſo Addio.

GIOVACCHINO SPADONI.

Alli Sigri Todd & Popple, di Hull. }

Pagabile in Londra.

A GERMAN BILL.

Hamburg, den 9 *September*, 1806, für L. 260 : 0 : 0 Sterling.

Drey monath nach dato, bezahten ſie gegen dieſen ſecunda wechſel (prima nicht) an die order der Herren Gebrüder Bethmann zwey hundert und ſechſzig pfund Sterling den werth in rechnung und ſtellen ſolgen in rechnung laut bericht.

Herren A. & D. Dahlmund in London. } G. S. KRONHELM.

APPENDIX,

No. H.

DUTIES EXIGIBLE ON BILLS AND NOTES, COMMENCING ON THE 11. OCTOBER 1804, BY ACT 44. GEO. III. C. XCVIII. § 2. & 8.

Bill of exchange, draft, order, or promiſſory or other note, for the payment of money to *the bearer on demand*, where the ſum ſhall amount to 40s. and ſhall not exceed 5l. 5s. - -	L.	0	0 8
— of exchange, draft, order, or promiſſory or other note, payable *otherwiſe than to the bearer on demand*, where the ſum ſhall amount to 40s. and ſhall not exceed 5l. 5s. -	0	1	0
— exceeding 5l. 5s. and not exceeding 30l. - - - - -	0	1	6
— exceeding 30l. and not exceeding 50l. - - - - - -	0	2	0
— exceeding 50l. and not exceeding 100l. - - - - - -	0	3	0
— exceeding 100l. and not exceeding 200l. - - - - -	0	4	0
— exceeding 200l. and not exceeding 500l. - - - - -	0	5	0
— exceeding 500l. and not exceeding 1000l. - - - - -	0	7	6
— where the ſum ſhall exceed 1000l. - - - - - - -	0	10	0
Foreign bill of exchange which ſhall be drawn in ſets according to the cuſtom of merchants, where the ſum expreſſed therein, or made payable thereby, ſhall not exceed 100l.—For *each* and every bill *in each ſet* - -	0	1	0
— above 100l. and not exceeding 200l. - - - - - -	0	2	0
— above 200l. and not exceeding 500l. - - - - - -	0	3	0
— above 500l. and not exceeding 1000l. - - - - - -	0	4	0
— above 1000l. - - - - - - - - - - - - - -	0	5	0
Promiſſory or other note, for the payment of money to the bearer on demand, (which may, within three years after the date thereof, but not at a later period, be reiſſued, from time to time, after payment at any place), where the ſum expreſſed therein, or made payable thereby, ſhall not exceed 1l. 1s. - - - - - - - -	0	0	3
— exceeding 1l. 1s. and not exceeding 2l. 2s. - - -	0	0	6
— exceeding 2l. 2s. and not exceeding 5l. 5s. - - - -	0	0	9
— exceeding 5l. 5s. and not exceeding 20l. - - - -	0	1	0

Promiſſory

Promiſſory or other note, for the payment by, or on account of, the Bank of Scotland, or the Royal Bank of Scotland, or the Britiſh Linen Company, to the bearer on demand, of the ſum of 100l., (which may, within three years after the date thereof, but not at a later period, be reiſſued, from time to time, after payment, at any place,) - - - - - - - - - - - L.0 5 0

Exemptions and Regulations.

Drafts and orders for the payment of money to bearer on demand, upon any banker, or perſon or perſons acting as bankers, and reſiding or tranſacting the buſineſs of a banker within ten miles of the place at which ſuch draft or order ſhall be drawn or given, and which place ſhall be expreſſed in or upon ſuch draft or order.

Bill, remittance bill, certificate, and all other bills, of what nature or deſcription ſoever, drawn by commiſſioned officers, maſters, or ſurgeons in the navy, for wages or pay, or by the commiſſioners of his Majeſty's navy, or by the commiſſioners for victualling his Majeſty's navy, or by the commiſſioners for taking care of ſick and wounded ſeamen, or by the commiſſioners for managing the tranſport ſervice, upon and payable by the treaſurer of his Majeſty's navy.

The duty on bills, drafts, &c. is payable by the drawer.

Any bill, &c. having a ſtamp of a *different* denomination, but of *equal* or *ſuperior* value to the ſtamp required, may, on the holder producing ſuch bill, &c. *before* the ſame ſhall become payable, be ſtamped on payment of duty, and 40s. penalty; but if payable before production thereof, *then* on payment of duty, and 10l. penalty.

Unſtamped bills or notes are void, and thoſe drawing or negotiating ſuch, or bills or notes improperly ſtamped, are anſwerable for the duty.

No note payable to bearer on demand for more than 20l., (except notes of the Bank, or Royal Bank, of Scotland, or the Britiſh Linen Company), ſhall be reiſſued, but ſhall be cancelled, on penalty of 20l.

No note payable to bearer on demand, which ſhall bear date before, or on 10th October 1804, ſhall be reiſſued after 10th October 1805, but ſhall be cancelled, on penalty of 20l.

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